IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 112.

C. L. WILLIAMS, individually and as duly appointed and authorized agent and representative for HERBERT AIKEN, et al., Petitioner,

v.

JACKSONVILLE TERMINAL COMPANY, a corporation, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, JACKSONVILLE TERMINAL COMPANY.

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DECEMBER 8, 1941.

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OPINIONS BELOW.

The order of the District Court containing findings of fact and conclusions of law (R. 195-203) is reported in 35 F. Supp. 267. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 214-222) is reported in 118 F. (2d). 324.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered on the fourth day of March, 1941 (R. 223).

The petition for a writ of certiorari was filed May 31, 1941, the jurisdiction of this Court being invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938, U. S. C. Title 28, Section 347 (a). The petition for certiorari was granted on October 13, 1941.

QUESTIONS PRESENTED.

(1) Whether or not the respondent, Jacksonville Terminal Company, hereinafter referred to as the defendant, complied with the minimum wage provisions of Section 6 (a) of the Fair Labor Standards Act by paying the wages of its red cap employes, represented by the petitioner, hereinafter referred to as plaintiffs, in accordance with its so-called Accounting and Guarantee Plan. Under that plan the red caps were required to report to the respondent the sums received by them from respondent's patrons for their services in the capacity of such employes, and such sums were applied on the red caps' wages. If the sums so accounted for exceeded the minimum statutory wage prescribed by Section 6 (a) of the Act, the red caps were permitted to keep the entire amount;

while if said sums fell short of the statutory minimum, respondent made up the difference by direct payment to the red caps.

This question may be broken down into the following two subordinate questions:

(*a*) Was the defendant, as employer of the plaintiff red caps, legally entitled to apply on the wages due from defendant to plaintiffs the sums received by the plaintiffs from the traveling public for services performed as defendant's employes and in the course of such employment?

(*b*) Did this method of payment satisfy the requirements of Section 6 (a) of the Fair Labor Standards Act?

(2) Whether or not under Section 6 of the Railway Labor Act the defendant was entitled to put into effect said Accounting and Guarantee Plan with respect to its red cap employes.

STATUTES INVOLVED.

The statutory provisions involved are Sections 3 (m), 6 (a), 11 (c) and 16 (b) of the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, at 1061, 1062, 1066 and 1069, U. S. C. Title 29, Sections 203 (m), 206 (a), 211 (c) and 216 (b); and Sections 2, seventh, and 6 of the Railway Labor Act, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, at 1188 and 1197, U. S. C. Title 45, Sections 152, seventh, and 156.

The provisions of the Fair Labor Standards Act, above referred to, are as follows:

"Sec. 3. As used in this Act * * *

"(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates —

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour.

"Sec. 11 (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder."

"Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act

shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The provisions of the Railway Labor Act as amended, referred to above, are as follows:

"Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows: * * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Sec. 6. Section 6 of the Railway Labor Act is amended to read as follows:

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements

affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

STATEMENT.

I. HISTORY OF THE CASE.

This is one of a series of cases brought against terminal companies and railroads throughout the country, all of which involve substantially the same issues of law. Other cases of the same series are *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, decided January 11, 1941 (United States District Court for the Western District of Missouri, Western Division); *Ryan* v. *The Denver Union*

Terminal Co., decided July 17, 1941, not yet reported (United States District Court for the District of Colorado); *Taylor* v. *Pennsylvania-Reading Seashore Lines, Inc.*, decided April 19, 1941, not yet reported (United States District Court for the Eastern District of Pennsylvania); *Union Terminal Co.* v. *Pickett*, 118 F. (2d) 328, decided March 4, 1941 (Circuit Court of Appeals for the Fifth Circuit, reversing 33 F. Supp. 244, United States District Court for the Northern District of Texas). In all these cases the decisions below have been for the defendants, and the last cited case, *Union Terminal Co.* v. *Pickett*, is on appeal in this Court and to be argued immediately following the argument in the case at bar.

In the case at bar, action was brought on August 19, 1940, by C. L. Williams, individually and as duly appointed and authorized agent and representative of other named persons, denominated in the complaint and hereinafter referred to as plaintiffs, against the defendant, Jacksonville Terminal Company, in the District Court of the United States for the Southern District of Florida, Jacksonville Division (R. 1). The complaint alleged that the plaintiffs, who were described as "red cap" employes of the defendant, were entitled to the sum of $59,923.08 as unpaid wages which the complaint alleged had accrued and had not been paid by the defendant (R. 4, 5). The sum so claimed represented the amounts reported by the red caps as collected by them from defendant's

patrons and which defendant had permitted them to keep and had applied on their wages. Plaintiffs contended that they should not merely have been permitted to keep such amounts, but should have been paid the full statutory minimum wage in addition. Further, plaintiffs claimed under Section 16 (b) of the Fair Labor Standards Act a like additional sum as liquidated damages, and an adequate attorney's fee (R. 5).

The defendant in its answer set forth that it had fully complied with the provisions of the Act by its so-called "Accounting and Guarantee Plan" (R. 7-12). Under this plan plaintiffs and all other red cap employes of the defendant were required to report to the defendant the amounts of money received by them from the Terminal Company's patrons for the services which they rendered to such patrons in the course of their employment by defendant (R. 9-11; 121-122). The red caps were permitted to keep all such money, whether it amounted to more or less than the statutory minimum wage for the hours which they worked, and, in the event that it amounted to less, the Terminal Company announced that it would pay to them (R. 121-122), and did in fact pay to them (R. 13-44; Stipulation, par. 4, R. 47-48), the additional amount needed to make up the deficit between the sums collected by each red cap from the defendant's patrons and the statutory minimum wage. If the red cap reported receipts in excess of the statutory minimum wage he was permitted to keep the entire amount (R. 65).

Plaintiffs and defendant each filed a motion for summary judgment (Pl. Motion, R. 48; Def. Motion, R. 44). Certain stipulations were entered into and certain depositions taken by the plaintiffs, in the course of which plaintiffs introduced various exhibits. On October 21, 1940, the trial court granted the defendant's motion for summary judgment, denied the plaintiffs' motion for summary judgment, and dismissed the complaint (R. 195-203).

Plaintiffs appealed to the Circuit Court of Appeals for the Fifth Circuit which, on March 4, 1941, affirmed the judgment of the trial court, Circuit Judge Holmes dissenting (R. 214-223).

II. STATEMENT OF FACTS WITH RESPECT TO THE APPLICATION OF SO-CALLED "TIPS" ON PLAINTIFFS' WAGES.

The circumstances which eventuated in the Accounting and Guarantee Plan are set forth in paragraphs 6 and 7 of Defendant's Answer herein (R. 8-10), and are disclosed by the report of the Interstate Commerce Commission in *Regulations Concerning Employees under Railway Labor Act, Ex Parte No. 72 (Sub-No. 1)*, 229 I. C. C. 410 (1938). In 1937 and for many years prior thereto, American railroads and terminal companies, including the defendant Terminal Company, treated so-called "red cap" porters at their passenger stations as concessionaires, entitled to offer their services to the railroads' patrons, under certain

rules and regulations designed to assure efficient and courteous service, to patrons who desired the service. The defendant Terminal Company, like many other railroads, paid no wages directly to the red caps, but permitted them to collect and retain all sums that were paid them for their services by the public.

On July 10, 1937, the International Brotherhood of Red Caps filed a petition with the Interstate Commerce Commission praying the Commission, under authority alleged to be vested in it by Section 1, fifth, of the Railway Labor Act (as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1186, U. S. C. Title 45, Section 151, fifth), to make a finding that red cap porters were employes of the railroads on whose premises they served. On October 10, 1938, the Commission, by Division 3, granted the request and made a finding that red caps were employes at passenger stations and other places on carriers' premises in cities of over one hundred thousand population (229 I. C. C. 410, at page 420).*

On October 24, 1938, or about two weeks after the order of the Interstate Commerce Commission was announced, the minimum wage provisions of the Fair

* It appears from the report (page 415) that the carriers, in the proceedings before the Commission, contended that the Commission was without jurisdiction under Section 1, fifth, of the Railway Labor Act, to determine the status of persons as employes or non-employes, a position which the Commission rejected in that case but which it has subsequently adopted in *Hudson & M. R. Co. Employees—Railway Labor Act, Ex Parte No. 72 (Sub-No. 1)*, decided May 6, 1941 (245 I. C. C. 415). However, when the Commission's report of October 10, 1938 was made, this Court had already rendered its decision in *Shannahan* v. *United States*, 303 U. S. 596, 58 S. Ct. 732 (1938), *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 59 S. Ct. 754 (1939) had not yet been decided, judicial review did not seem available, and the carriers acquiesced.

Labor Standards Act were, by their terms, to become effective (Fair Labor Standards Act, Section 6(b)). The railroads, including the defendant Terminal Company, were, therefore, confronted with the problem of adjusting themselves to two new situations at once: first, the situation created by the necessity of treating as employes a class of workers whom they had not before regarded as such, and second, the necessity of complying with the provisions of the Fair Labor Standards Act with respect to such employes. The Accounting and Guarantee Plan was the result of an effort to meet these two problems.

In order to understand that plan it is necessary to look, first, at the situation created by the Commission's finding that red caps were not concessionaires, as the railroads had hitherto treated them, dealing with the public on their own account, but instead were employes of the railroads (Def. Ans. par. 6, R. 8-9).

So long as the red caps were treated by the railroads as concessionaires, there was no question of their right to retain as their own whatever sums they collected for performing such service as they were called upon to perform by those of the traveling public who retained and compensated them. Such compensation as they received was theirs because they performed the work on their own account. When, however, their status in performing this work was defined by the order of the Interstate Commerce Commission as that of employes, it at once followed that in performing the work they were acting not for their

own account but for the account of their employer (Def. Ans. par. 6, R. 9).

This is of course clear, because a worker cannot at one and the same time occupy two mutually inconsistent positions. If he is working for his own account as a concessionaire, or independent contractor, he cannot at the same time, and with respect to the same work, be an employe. On the other hand, if he performs the work as an employe, then he must be doing it for his employer. Accordingly, if the red caps were employes of the railroads in carrying hand baggage or performing other service for passengers, they must have been performing this service for the account of the railroads as their employer, and not for themselves as independent businessmen.

The order of the Interstate Commerce Commission which found the red caps to be railroad employes thus created a situation that necessarily affected the status of the sums which they received from the public for their services. As long as they were treated as concessionaries or independent contractors on their own account, the railroads, which permitted them to work upon their premises, had no concern whatever with the compensation which they received for such work. The moment, however, that they were held to be employes of the railroad, it necessarily followed that the work they did was done in the capacity of employes and, therefore, done by the railroad through them, in the same way that any employer serves the public through his employes. Where work is thus

done by an employer through employes, the employer is naturally entitled to whatever compensation is received for the service, whether paid by the public to the employes or directly to the employer. Correspondingly, the employes' own compensation must in turn come from the employer.

It follows, therefore, that when the red cap porters became employes of the railroad with respect to the performance of the service in which they were engaged, the railroads became entitled to the money which the public paid for the performance of that service. *A fortiori* if the red caps, as they contended before the Interstate Commerce Commission, had in fact always, or at least for many years, been employes of the railroads, then throughout that entire period the railroads had been entitled to the money collected by the red caps and, had they so desired, could have called upon the red caps to turn over that money to them, paying them directly a regular wage, instead. This the railroads had not done, and, if the red caps were employes all along, their right to retain their receipts from the public was derived from the permission of their railroad employers. In other words, the situation must be taken to have been one in which those employers, instead of directly paying the red caps a fixed amount of money as their wage, allowed them to treat as wages whatever they received from the traveling public. This result necessarily ensues from the status of the red caps as employes, from whatever date that status is regarded as having come into existence—whether from the date of the finding

of the Interstate Commerce Commission or from some earlier date as claimed by the red caps.

This situation resulting from the employer-employe relationship confronted the railroads when it became necessary for them to determine in what manner to meet their obligations to the red caps under the Fair Labor Standards Act. Of course, no proof or argument is needed to establish the obvious fact that the red caps would have liked the railroads to pay them directly an amount equal to the full wage prescribed by the Act and at the same time permit them, in addition, to retain for themselves, as before, the full compensation paid by the public for the performance of the service. They would, of course, not have objected to occupying the inconsistent position of employes for the purpose of receiving a wage from the railroads and of independent concessionaires for the purpose of themselves collecting and keeping all that the public paid for their services. The railroads might, indeed, have adopted this course, but had they done so the result would have been in practical effect, as well as in legal analysis, to have increased the red caps' wages by whatever additional amount was collected by them from the public for their services. Each red cap would thus have received two wages, and both in effect from his employer, viz.: the wage directly paid by the railroad from its treasury, and the additional wage paid in the form of permitting him to retain the money paid by the public for the service performed by the railroad through him as its employe.

The railroads, including the defendant Terminal Company, proceeded as if it were not necessary for them to adopt such a course in order to comply with the provisions of the Act. It is clear that other possible courses were available, among which was the so-called Accounting and Guarantee Plan which they did in fact adopt (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 55, 121-122).

A conceivable course would have been for the railroads to do at once in October, 1938, what as a matter of common knowledge they have practically all done subsequently, namely, announce to the public a fixed charge for red cap service at the rate of so much per package handled, requiring the red caps in the course of their duties to act as collectors of this charge, in the same way that an attendant at a parcel room collects and turns in to the company the charge of so much per parcel handled (R. 64-65). The sudden and immediate introduction of a practice of this kind, so relatively novel in character, presented the danger of disturbing existing and well understood practices and relations between the railroads and the traveling public.

A second alternative, which would have involved no innovation so far as the public was concerned, would have been simply to instruct and require the red caps to turn in to the company at the close of each tour of duty the amounts received for the service which, through them as its employes, the company was now rendering to the public. If this plan had been

adopted, the amounts so received by the company would have gone to increase the funds out of which the company's obligation to pay wages to the red caps at periodic pay-days would have been defrayed. This alternative, therefore, would have been only a more roundabout method of accomplishing the same result which was, in fact, more simply and directly accomplished by the Accounting and Guarantee Plan (Def. Ans. par. 7, R. 9-10).

The basis and theory of the Accounting and Guarantee Plan, as is apparent on the face of the plan, was nothing more nor less than that the employing company, instead of requiring the red caps to turn over to it daily the compensation which they received from the public for the service they rendered as employes of the company, and subsequently paying them wages on fixed pay-days in whole or in part out of the sums turned in, would follow the simpler method of permitting them to retain such sums toward the payment of their wages and then pay them out of the company's treasury any deficiency between the amounts which they were so permitted to retain and the full amount of the minimum wage which the employer was required to pay them by the provisions of Section 6 (a) of the Fair Labor Standards Act. This was the method which the defendant, in common with practically all the other railroads of the country, adopted (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 55, 121-122; R. 64), and which has given rise not merely to the present suit but to the others referred to above.

It is clear that in effect the method was no more than a continuation of that under which the red caps had previously been paid, assuming them, according to their own contentions, to have always been employes of the carriers rather than concessionaires. As has been pointed out above, if they were in fact employes prior to July 10, 1937, the date of their petition to the Interstate Commerce Commission, their right to retain the amounts which they collected from the public for their services was derived from the permission of the employer, and these amounts, therefore, constituted in effect wages paid by the employer. Of course, prior to the adoption of the Accounting and Guarantee Plan it was possible that those wages might not have amounted to the statutory minimum prescribed by the Fair Labor Standards Act. The Accounting and Guarantee Plan was introduced for the purpose of avoiding this possibility. The red caps, as before, were compensated by their employer by being permitted to retain the sums received for the service which they performed for the public as his employes. The only change introduced by the Accounting and Guarantee Plan was that under that plan the employer agreed to make up, and did in fact make up, any deficiency by which such sums fell short of the statutory minimum. The requirement to report was merely for the purpose of enabling the employer to make up the deficiency (R. 64-65).

The plan had the additional advantage for the red caps that, in the event that the amount which they

received from the public as compensation for the service that they performed, and which they reported to their employer, exceeded the minimum wage prescribed by law, they were permitted by the employer to retain the entire amount, including the excess (R. 65). Thus, under the plan, employes could not receive less than the minimum statutory wage, while they had the opportunity of earning more.

Further, the plan operated for the accommodation of the red caps by not requiring them to wait for periodic pay-days to receive their wages, but, instead permitted them to have available a sum of money at the close of each day as they had always been accustomed to in the past, thus not imposing on them any inconvenient change in their habits (R. 64-65).

The Accounting and Guarantee Plan was placed in effect by the defendant Terminal Company by serving upon each of the red caps a notice immediately prior to October 24, 1938, the date on which Section 6(a) of the Fair Labor Standards Act became effective. Said notice was in the following form (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 35, 121-122):

> "In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

On and after October 24, 1938, each of the said red caps, pursuant to this notice and throughout the period covered by this action, retained all money received by him from passengers of defendant Terminal Company and made daily reports to the defendant of the amount so received. In every case where the total of the amounts received by a red cap from the defendant's passengers was less than the minimum wage requirement of the Act, the defendant paid to each red cap reporting such a deficiency the difference between the amount so reported and

the minimum prescribed by Section 6 of the Act, with the result that each and every one of the plaintiffs for the whole period covered by this action received an amount of money equal to or in excess of the statutory minimum wage. This appears from the Bill of Particulars (R. 13-44), which the plaintiffs admit by stipulation (R. 47-48) to be true.

The Bill of Particulars discloses that during the period covered by the suit, viz., from October 24, 1938, when the Accounting and Guarantee Plan was introduced, to June 30, 1940, when it was superseded by the imposition of a direct service charge to the public, the red cap plaintiffs received from the defendant Terminal Company an amount equal to the total minimum statutory wage, viz., $40,594.69, of which $32,273.36 represented so-called tips reported by the red caps as having been received from the public, while $8,321.33 represented amounts received directly from the defendant Terminal Company to make up the difference between the sums received by each red cap from the public and the amount of such red cap's statutory minimum wage (R. 13). The Bill of Particulars also shows, under Items 5 and 6, that the aggregate sum received by the red caps from the public amounted during the period to $35,293.12, of which only $32,273.36 was applied on their wages; the excess, amounting to $3,019.76, represents the sums which particular red caps received from the public in excess of their statutory minimum wage and which under the Accounting and Guarantee Plan they were

permitted to keep (R. 13). In other words, not merely did every red cap receive the full amount of the statutory minimum wage, but the red caps as a group received more than $3,000 in excess of the minimum wage prescribed by law.

The application of simple arithmetic to the figures summarized from the record in the preceding paragraph discloses that, taking the plaintiff employes of the Terminal Company as a group, four-fifths of their statutory minimum wages were derived from the sums paid by the public for the service. The statutory minimum wage during the period covered by this action was 25 cents per hour during the first twelve months and 30 cents per hour during the final nine months, or a weighted average of 27 cents per hour. Four-fifths of 27 cents per hour is 21.6 cents per hour. If the plaintiffs are correct in their contention that they were entitled to retain the amounts collected from the public and in addition be paid by the defendant the full statutory wage, the result would have been that during the first twelve months covered by this action they would have received earnings at the rate of 46.6 cents per hour, and during the last nine months of the period at the rate of 51.6 cents per hour. In short, the plaintiffs' contention is that under the Fair Labor Standards Act they were legally entitled to earn 46.5 cents per hour for the first twelve months and 51.6 cents per hour for the ensuing nine months.

III. STATEMENT OF FACTS WITH RESPECT TO THE EFFECT OF THE RAILWAY LABOR ACT.

Not merely do the plaintiffs contend that the defendant's payment of wages to them under the Accounting and Guarantee Plan thus failed to comply with the requirements of the Fair Labor Standards Act; but they also advance the additional contention that the defendant had no right to put the Accounting and Guarantee Plan into effect because of certain provisions of the Railway Labor Act (Petitioner's Brief, pp. 13, 21-25). Briefly stated, their argument rests on the proposition that the sections of the Railway Labor Act to which they refer, viz., Section 2, seventh, and Section 6, prohibit the employing carrier from changing by unilateral action the terms of an existing collective agreement (Petitioner's Brief, pp. 21-25). To derive support from this proposition they contend in their brief that, at the time when the defendant gave notice of the Accounting and Guarantee Plan to its red cap employes, there was in existence an agreement covering those employes which the defendant attempted to change unilaterally by instituting the Accounting and Guarantee Plan. This contention is most clearly stated in the first specification of error, which appears at page 18 of petitioner's brief in this Court. The specification is that the court below erred:

> "in holding that the railroad may by its own fiat disregard its existing bargaining agreement

with red caps and pending negotiations with their accredited representative, by its own unilateral action effect a change in the rates of pay and working conditions in the face of a continued series of protests and refusals to consent."

The contention thus advanced makes it necessary to summarize in this statement a sequence of facts set forth in the various depositions and exhibits contained in the record. These depositions and exhibits relate to conferences, negotiations and correspondence which took place beginning October 25, 1938, between L. L. Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, and J. L. Wilkes, President and General Manager of the defendant Terminal Company, looking towards the negotiation of a collective agreement to cover the latter's red cap employes. The facts disclosed by these depositions and exhibits relate to the question of when such an agreement was entered into and what provisions it contained. Their relevance, if any, is with reference to the claim of the plaintiffs, now presented in this Court for the first time, that on the date when the defendant introduced the Accounting and Guarantee Plan by its notice of October 24, 1938, its red cap employes, including the plaintiffs, were already covered by an existing agreement of February, 1937, between the Terminal and the Brotherhood of Railway Clerks. This contention, it is submitted, is completely disproved by the facts in the record, which will now be reviewed.

The notice of the Accounting and Guarantee Plan as set forth above was delivered to each of the defendant's red caps before October 24, 1938 (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 55, 121-122). On the following day, October 25, 1938, Wooten, who was the General Chairman of the Railway Clerks' organization in Jacksonville, wrote a letter to Wilkes and other officers of the defendant Terminal Company (Pl. Ex. 1-A, R. 52, 93-94), in which he called attention to the decision of the Interstate Commerce Commission in *Ex Parte No. 72* to the effect that red caps were employes under the terms of the Railway Labor Act and advanced the contention that since they were employed in and around stations they were automatically brought within the jurisdiction of the Clerks' organization and so came within the scope of the then existing agreement between the Clerks' organization and the Terminal. This agreement, effective February 1, 1937, is set forth as Defendant's Exhibit No. A (R. 81, 166-189).

There is a statement in petitioner's brief (page 23), to the effect that:

> "The Terminal Company's * * * failure to challenge the coverage of the Red Caps by the agreement of February 17th, 1937, until after the institution of this suit leaves the inescapable conclusion that each of the parties considered that this agreement covered these Red Caps from the date of the ruling of the Interstate Commerce Commission."

This is a simple misstatement of fact. The record is replete with evidence that the Terminal Company from the very beginning challenged the contention that the red caps were covered by the Clerks' agreement of February 17, 1937. Thus on October 27, 1938, Wilkes replied to the foregoing letter from Wooten, in a letter which is set forth as Plaintiffs' Exhibit 19 (R. 55-56, 122-123). The pertinent paragraph of this letter of Wilkes is as follows:

> "It is my opinion that Paragraph (a) under the subject of Exceptions in our agreement" [viz.: the above-mentioned agreement of February, 1937, between the Terminal and the Clerks] "exempts Red Cap service from the application of the rules of that agreement, as they are individuals performing personal service not a part of the duties of the company. Red Caps were not included or mentioned by name in the negotiations of our existing agreement, and in our recent conference subsequent to the decision of the I. C. C., *Ex Parte 72*, you stated to me that your organization did not represent the Red Caps. I think the wording of our agreement under Exception (a) is very clear, and must have had in mind such a type of employe as the Red Cap, who performs strictly personal service for the passengers which is not a part of the duty of the company. However, assuming that my views as above expressed should be held to be wrong, it still seems to me that in view of the fact that your organization has never represented Red Caps in the past, these Red Caps, now termed by the I. C. C. to be employes under the Railway Labor

Act, should have a voice as to whom represents them; and until such a time as the entire matter is cleared up, we do not feel that representation arbitrarily seized or taken by your organization should be recognized. Possibly, some clarification of this may come in the near future, and I shall be glad to talk it over with you on your next trip into Jacksonville.

Yours very truly,

(s) J. L. WILKES
President-General Manager."

This letter plainly shows that Wilkes refused to recognize that Wooten as Chairman of the Clerks represented the red cap employes of the Terminal, and, *a fortiori*, denied that these red caps had been brought automatically by the decision of the Interstate Commerce Commission under the existing agreement between the Clerks and the Terminals. At the same time he insisted that, since the Clerks' organization had never represented the red caps, the red caps should have a voice as to who should represent them, and that, without such an expression by the red caps, the right to represent them should not be arbitrarily seized by the Clerks.

In response to this demand by Wilkes that the red caps should have a voice as to their representative, Wooten thereupon proceeded to obtain authorizations from the red caps to act as their representative, as appears from his testimony as follows (R. 71):

"*Direct Examination.*

By MR. L'ENGLE:

Q. State your name and residence, Mr. Wooten.

A. L. L. Wooten, Wilmington, North Carolina.

Q. What is your present occupation, sir?

A. General Chairman, representing the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, on the Atlantic Coast Line Railroad; the Jacksonville Terminal Company, the Albany Passenger Terminal Company, the Savannah Union Station, and the Charleston Union Station.

Q. I understand this organization to be a union of employees of the railroads working under the Atlantic Coast Line Railroad Company?

A. It is an international organization, composed of employees in the clerical and station and storeroom classes.

Q. Does that organization have the authority, or were they appointed by the red caps, or the plaintiffs in this case, the red caps employed by the Jacksonville Terminal Company, to negotiate contracts and wage agreements for them with the Jacksonville Terminal Company?

A. It was.

Q. At or about what time?

A. About November 3rd, was when the official authorizations were turned over to me.

Q. What year?

A. 1938."

From this testimony it is plain that Wooten dates his right to represent the red caps from "about November 3rd", 1938, when his organization received

the authority from, or was appointed by, the red caps to negotiate for them with the Jacksonville Terminal Company. This negatives the statement in petitioner's brief (p. 23) that "the only authority Wooten had to treat with Wilkes for the Red Caps was the collective bargaining agreement of February, 1937," and disposes of the contention that the Clerks' organization represented the red cap employes of the Terminal Company at any time prior to November 3, 1938. Clearly, therefore, that organization did not represent the red caps at the time when it negotiated the Clerks' agreement of February, 1937, with the Terminal, and the red caps were not represented in the negotiation of that agreement, were not parties to it and had no rights under it.

Even without the foregoing recognition by Wooten of the need to obtain authorizations from the red caps before being entitled to represent them, there is no basis in the record for the contention made in his letter of October 25th to Wilkes, that the red caps when they were declared employes by the Interstate Commerce Commission came automatically under the Clerks' agreement of February 1, 1937, with the Terminal. That agreement under the heading "Exceptions" contains the following language (Def. Ex. A, R. 81, 167):

> "These rules shall not apply to the following:
>
> "(a) * * * to individuals performing personal service not a part of the duties of the Company."

This is the language referred to by Wilkes in the following sentence of his above-quoted letter (Pl. Ex. 19, R. 55-56, 123):

> "I think the wording of our agreement under Exception (a) is very clear, and must have had in mind such a type of employe as the Red Cap, who performs strictly personal service for the passengers which is not a part of the duty of the company."

That Wilkes was correct in his supposition that this language referred to red caps appears from the report of the Interstate Commerce Commission in *Ex Parte No. 72* (229 I. C. C. 410, at page 415), where the Commission, referring to a ruling of the Director General of Railroads, uses the following language:

> "The Director General of Railroads on March 14, 1919, issued a ruling interpreting his General Order 27 and Supplement 7 thereto as follows: 'The service performed by "Red Caps" is personal service not a part of the duty of the carrier'."

The use of this identical language of the Director-General in the agreement of 1937 between the Clerks' organization and the defendant Terminal Company is hard to reconcile with any other conclusion than that it was meant to be used in an identical sense, and, since the Director General used the language with

reference to red caps, it is difficult to believe that it should not be construed as applying to them when used in the Clerks' agreement.

Quite apart from this, however, Wooten's contention, in his letter of October 25th (Pl. Ex. 19, R. 55-56, 122-123), that a new group of workers, on becoming, or being recognized as, employes, thereby fall automatically under the provisions of an existing agreement without any expression of their desire to do so or any opportunity to have a voice respecting the terms of the agreement, was apparently so novel and extreme that he himself abandoned it by obtaining the authorizations of November 3rd, referred to in his testimony quoted above (R. 71), and which must be taken to speak from that date. The representation of the plaintiff employes by the Brotherhood of Railway Clerks cannot therefore be held to antedate November 3, 1938.

Furthermore, having obtained these authorizations, Wooten seems at the time to have recognized that it was no longer possible to claim that the red caps came under the contract of 1937 which the Clerks' organization had negotiated more than a year before they had any authority to represent the red caps, and that a new contract covering the red caps was accordingly necessary. This appears from his letter to Wilkes of November 14, 1938 (Pl. Ex. 1, R. 51, 95), which reads as follows:

"WILMINGTON, N. C., Nov. 14th, 1938.

"Mr. J. L. Wilkes,
Pres. General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

"DEAR SIR:

"Referring to our conference on the 4th. relative to contract for Red Caps.

"We would like to get this closed up as soon as possible and I was wondering if you could meet me about the 21st. or very soon thereafter and draw and sign a contract covering them as you did not seem to be willing to agree that our present contract should cover them.

"Will you please advise me when you can go into this again with a view of drawing the rules along the general lines outlined to you on Nov. 4th.

Yours very truly,
(s) L. L. WOOTEN,
General Chairman."

This letter is a clear indication of an abandonment of the claim that the red caps were covered by the contract of 1937, and is an invitation to Wilkes to negotiate a new and separate contract covering them.

But Wooten was not content with the mere prospect of negotiations for a new contract. His next position was the novel and inconsistent one of claiming that the 1937 contract was applicable at least until a new one could be arranged—in other words, that a contract which did not exist as between the parties in

question should be treated as though it did exist with respect to them until a contract which actually covered them could be agreed upon. This position is revealed in Wooten's letters of November 16th (Pl. Ex. 2, R. 52, 96) and November 26, 1938 (Pl. Ex. 3, R. 52, 97), in the first of which he states that he had advised Wilkes on October 25th that he considered the red caps as coming within the scope of the existing Clerks' agreement until such time as a separate agreement might be made therefor, and in the second of which he states, "We have advised you that we will expect the terms of our existing agreement to apply to red caps until such time as changes might be made."

However, it is entirely clear from Wooten's letter of December 7, 1938 (Pl. Ex. 5, R. 52, 100-101), that Wilkes did not agree that the existing Clerks' contract should be treated as applicable to red caps, since the letter complains that the Terminal Company was not applying the rule of seniority in laying off men as required by that contract, and Wooten threatens to take the matter to the "Board" (by which is apparently meant the National Railroad Adjustment Board at Chicago). He continues: "If we are to hold the contract matters in abeyance, such unjustices must be rectified, for while we want to be reasonable we feel that the present agreement applies until such time as you may be willing to consider and agree on the proposals made to you some days ago."

There is nothing whatever in the record to indicate that at any time Wilkes or any one else authorized to represent or speak for the Terminal Company accepted or acquiesced in the view that the red cap employes of the Terminal were covered by the Clerks' agreement of 1937. That the Terminal's ultimate recognition of the right of Wooten and the Clerks' organization to represent the red caps was based solely upon the specific authorizations which they had obtained from the red caps on or about November 3, 1938, is shown by Wooten's letter to Wilkes dated February 20, 1939 (Pl. Ex. 8, R. 53, 103-104), in which the following sentence occurs:

> "You have, *after proof was submitted,* recognized our organizations as being the *duly authorized organization* to represent these men." (Emphasis supplied.)

In short, the recognition by the Terminal Company of Wooten and the Clerk's organization as the authorized bargaining representatives of the red cap employes does not sustain the inference that the Terminal thereby recognized and accepted the organization's contention that the red cap employes came under the provisions of the existing agreement of 1937, which was negotiated with respect to other classes of employes and which explicitly excepted red caps. On the contrary, the Terminal's recognition of the Clerks' organization as the bargaining representative of the plaintiffs was based only upon the specific authorizations which that organization had

obtained on or about November 3, 1938, and the effectiveness of which dated from that time.

The inconsistency of Wooten's position is made clear by a sentence from Wilkes' letter of October 27, 1938, to Wooten (Pl. Ex. 19, R. 55-56, 122-123), already quoted above, which reads as follows:

> "In our recent conference subsequent to the decision of the I. C. C., *Ex Parte 72*, you stated to me that your organization did not represent the Red Caps."

This sentence is to be read in connection with the following statement by Wooten in his deposition on cross-examination by Mr. Hartridge (R. 80):

> "The date of *Ex Parte 72*, sub one was September 29, 1938. That *Ex Parte* was given to me, delivered to me, on October 24, 1938. The Red Caps employed by the Jacksonville Terminal Company had been negotiating with me for approximately two years to become organized and get an agreement or come within the scope of our agreement. The question of whether or not Red Caps were employees under the amended Railway Labor Act was before the Interstate Commerce Commission; and I notified these employees that it would be useless to become organized until the Commission had rendered their decision, but that as soon as that decision was rendered, if it was favorable, we would accept the employees into the organization and make contracts and handle their wages and working conditions as provided by the amended Railway Labor Act."

This statement by Wooten indicates definitely that up to October 24, 1938, it was his position, and was so stated by him to the red caps at the Jacksonville Terminal, that after the decision of the Interstate Commerce Commission in *Ex Parte 72*, and not until then, would the Clerks accept the red caps into their organization, and that thereafter they would proceed to make contracts and handle their wages and working conditions. This position is entirely inconsistent with the contention that the red caps were already covered by the Clerks' agreement, which was made more than eighteen months prior to that time. To hold that the Clerks, by receiving the red caps into their organization after they were declared employes, could automatically bring these new employes within the prior existing agreement made by the Clerks with the Terminal with reference to other and different classes of employes, would be to claim for the Clerks a right to alter that agreement unilaterally; contracts are not to be so altered.

A full and complete agreement covering red caps was finally negotiated and entered into between Wilkes, representing the Terminal, and Wooten, representing the employes, to become effective on June 16, 1939. This agreement is set forth in the record as Plaintiffs' Exhibit 12, R. 54, 107-116. Plaintiffs' counsel, in his brief in this Court, repeatedly attempts to represent this agreement as a mere amendment of the Clerks' agreement of February, 1937. Thus, he says (Petitioner's Brief, page 7):

> "During the month of June, 1939, a similar agreement was actually entered into by Wilkes on behalf of the Terminal Company and Wooten on behalf of the Red Caps (R. 107), *which was the first amendment to the collective bargaining agreement of February, 1937.*" (Emphasis supplied.)

There is nothing whatever in the circumstances leading up to the making of this agreement to support the contention that it was an amendment of the Clerks' agreement of 1937, and in fact the agreement of June, 1939, on its face expressly negatives such a contention. It is a complete and self-sufficient agreement, covering by its own provisions with respect to the red caps many of the subjects which the earlier Clerks' agreement undertook to cover with respect to the classes of employes that were subject to that agreement. Furthermore, Rule 1 of the red cap agreement of June, 1939, expressly negatives the claim that the red caps were subject to the prior and still subsisting Clerks' agreement of 1937, for this initial rule of the red cap agreement, to which the red caps are admittedly subject, expressly states that:

> "These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains, and all other employes handling hand baggage *not already covered by agreement.*" (Pl. Ex. 12, R. 54, 107-108.) (Emphasis supplied.)

It is clear from the record that this agreement of June, 1939, was the first agreement of any kind

entered into between the defendant Terminal Company and any collective bargaining representative of the red caps. It was the first collectively bargained agreement between the plaintiffs and their employer, the defendant Terminal Company, and it was made more than seven months after the Terminal Company had put into effect the Accounting and Guarantee Plan by its notice of October 24, 1938.

This agreement, as concluded and executed, contains no provision whatever with respect to wages or methods of wage payment. During the entire period of the negotiations which led up to it, the red caps were working and being paid under the Accounting and Guarantee Plan. Wooten in a letter of November 30, 1938, to Wilkes (Pl. Ex. 4, R. 52, 98-99) proposed that, when an agreement should be entered into, it should contain the following provision with respect to wages:

> "Twenty-five cents per hour to be paid as a minimum on any day for four hours service, which can be spread in a period of not more than nine hours, or date [eight?] within a twenty-four hour period, and red caps to be allowed such tips as they might secure during the entire time in and around station."

The record indicates that this and the other proposals contained in the same letter of Wooten were the subject of continuous conference with the Terminal Company during the ensuing months.

This proposal of Wooten's with respect to wages

was intended to take the place of the Accounting and Guarantee Plan then and subsequently in effect, and amounted to a demand that the red caps be allowed to retain all the compensation or tips which they received for their services from the public and, at the same time, be paid twenty-five cents an hour in addition by the employer, which was the minimum hourly rate prescribed by the Fair Labor Standards Act. Wilkes, representing the Terminal Company, declined to accede and, as pointed out above, when an agreement was finally reached in June, 1939, no provision was included respecting wages, and the Accounting and Guarantee Plan continued in effect. Wooten testified in his deposition that the question of wages was subsequently discussed at various times between himself and Wilkes down to July 1, 1940 (R. 77).

Wooten further testified (R. 74) that, at the time when the agreement of June, 1939, was concluded without any provision respecting wages, he discussed with Wilkes the bearing of the Fair Labor Standards Act on the Accounting and Guarantee Plan, and told him that:

> "We would * * * wait on the decision or order of the Federal Wage and Hour Administrator as to the question of wages, as there had been set a hearing in Washington on this entire question of whether or not tips could be accounted as any part of wages."

He further stated that the hearing to which he referred was that conducted before the Wage and Hour

Division of the Department of Labor at the instance of the Brotherhood of Red Caps and the Brotherhood of Railway and Steamship Clerks, which resulted in the publication of "Findings and Recommendations" by the "presiding officer," Gustav Peck. These "Findings and Recommendations" appear in the record as Plaintiffs' Exhibit 33 (R. 75, 148-164). The pertinent recommendation appears at R. 164, to the effect:

> "That the Division" [viz., the Wage and Hour Division of the Department of Labor] "take immediate steps through Court action to determine the validity of the accounting and guarantee arrangement under which many Red Caps are employed."

Wooten testified (R. 77):

> "Mr. Wilkes, in all of the conversations * * * eventually stated that whatever was done by the Courts, that his company would have to do."

Finally, there occurs this series of questions and answers between Wooten and his counsel (R. 78):

> "Q. Is that the reason that the question of wages was left out of the June 16, 1939 agreement, so that it could be put in the agreement in the event of a decision on the matter by the Administrator or by some judicial determination?
>
> A. Yes, sir.
>
> Q. There was not an agreement between you, representing these men, and him that the Guarantee and Accounting System should stand as the

manner and amount of wages to be paid these employees?

A. No, sir.

Q. Or that the system in existence at the time, that is, subsequent to June 16, 1939 agreement up to July 1, 1940?

A. No, sir. We protested that system and contended that at all times, in letters and personal conferences, that tips had no place as being any part of the wage that the law specified the employer should pay to the employee. And in many of these instances, I cited Mr. Wilkes to the rulings under the N. R. A. with regard to Dining car help, Pullman Porters, Hotel help, and many others, that tips were no part of wages.

Q. Then, I may say that your understanding with Mr. Wilkes was that the matter of wages, was to be left out of the contract until a determination, either by the Administrator or some judicial proceedings?

A. That is correct; and that we would then negotiate or apply whatever that decision might be, because I felt, and I think he did, that that was beyond our control whenever the Court or the Administrator might decide that issue."

It is submitted that all that the foregoing testimony and all the other testimony and exhibits in the record disclose, with reference to conversations and negotiations on the subject of wages, is that during the period covered by this suit there was never with respect to wages any collectively bargained agreement between representatives of the Terminal and representatives of the plaintiffs; that Wooten, as collective

bargaining representative of the plaintiffs, never agreed to accept the Accounting and Guarantee Plan; that he contended that the red caps were entitled to receive the full amount of the compensation or tips paid by the public in addition to the full statutory minimum wage, and that he and Wilkes were in agreement that the question would ultimately have to be determined by the courts, and that the Terminal would do whatever the courts ultimately should decide. In short, each party insisted on its own view of its legal rights, and in consequence the agreement of June, 1939, left the question of wages open.

Petitioner's brief advances the peculiar and entirely unsupported contention of fact that the Terminal Company abandoned and waived the effectiveness of its notice of October 24, 1938, which placed the Accounting and Guarantee Plan in operation. This assertion is made in the eighth Specification of Error at page 19 of the brief, and again on page 27. The two passages follow:

"The Court below erred:

"8. By holding that the Railroad could assert that its notice imposed a condition of employment, despite the Railroad's clear abandonment and waiver thereof; and despite the Railroad's execution of a collective bargaining agreement silent on wages and rates of pay for the admitted purpose of awaiting an authoritative determination of the Red Caps' right to and ownership of tips." (Specifications of Error, No. 8, Petitioner's Brief, p. 19.)

"October 25th, 1938, Wooten advised the Terminal Company that the bargaining agreement of February, 1937, covered the men and requested a conference. Negotiations and conferences continued and it was recognized by both sides that there was an existing dispute as to wages and hours. By these negotiations the Terminal Company clearly abandoned and waived any effect sought to be given the notice and never claimed or pretended to claim ownership of the tips.", (Petitioner's Brief, p. 27.)

Certainly, there is nothing whatever in the record to support the assertion that the Terminal did not at all times insist upon and maintain the Accounting and Guarantee Plan during the entire period covered by this action. On the contrary, the record shows affirmatively that the defendant kept the plan in effect and paid the plaintiffs thereunder, as appears from the defendant's Bill of Particulars (R. 13-44), which the plaintiffs by stipulation admit to be correct (R. 47). Throughout the negotiations, as shown by the depositions and exhibits, Wilkes refused to accede to Wooten's demand that the plan be abandoned and the red caps permitted to retain their tips, as well as receive the full statutory wage from the company. Certainly, this demonstrates clearly that the defendant did not waive the Accounting and Guarantee Plan or abandon the effect of the notice putting that plan into effect. Counsel for the plaintiffs is apparently contending that the defendant destroyed the effect of its notice by entering into negotiations with

Wooten and by the frank admission of Wilkes that the Terminal would ultimately have to do whatever the courts should decide. It would indeed be novel and unwarranted to infer a waiver from such evidence.

It is worth while, in passing, to call attention to another misstatement, which is twice repeated in the petitioner's brief, viz., that the Terminal "neglected or refused to pay any amounts guaranteed by the notice until the latter part of July or the middle of August, 1939" (Petitioner's Brief, page 27), and that "under the accounting and guarantee plan the Terminal Company neglected or failed, or refused to pay or make good the guarantee until required by a representative of the Wage and Hour Department who had checked its records to ascertain whether or not the Red Caps had received the money which the payrolls of the Terminal Company indicated had been paid them. The first money received by the Red Caps from defendant was subsequent to August 15th, 1939". (Petitioner's Brief, page 10).

Both these statements are entirely unsupported by the portion of the record to which they are referred (R. 66-67), or by any other part of the record. In the passage referred to, Wilkes testifies respecting a so-called "settlement" which, he says, "began back in July," obviously referring to July, 1939. He describes this settlement as a voluntary change on the part of the Terminal in the method of computing the number of hours worked by the red caps. According to his explanation, the method originally followed in computing the number of hours worked

was, "to total up the time which the red cap said he had worked * * *. Later on we felt that that method of keeping the time probably was not equitable and that we should take into consideration the time that the men were hanging around the station, between jobs waiting for work, as the proper medium for the rate per hour * * *. Then we had a settlement with the men through this Frank Leggett as to what the assigned hours with which the base of pay from the hours actually worked to the assigned hours; the assigned hours were longer than the actual working hours" (R. 67).

In short, Wilkes in referring to the "settlement" is describing a change voluntarily made by the Terminal in the method of computing time to be paid for, which resulted in the accrual of a considerable amount of back pay for the red cap employes of the Terminal. The men were given the back pay thus accruing to them and thereupon, at the request of a representative of the Wage and Hour Department, signed the receipts of August 17, 1939, concerning which Wilkes was asked by plaintiffs' counsel. He replied:

> "The receipt which is mentioned in this question is a receipt which was originated by representatives of the Wages and Hour Department at Washington, who after checking our records sometime subsequent to August 15, 1939, decided to get a receipt from each individual red cap, to ascertain whether or not he had received the money which our payrolls indicated we had paid him in back pay" (R. 66).

Clearly there is nothing whatever in all this to show, as stated in petitioner's brief, that prior to August 15, 1939, the Terminal had not been paying the red caps the amounts needed to make up the Terminal's guarantee of the difference between the sums received by the red caps from the public and their statutory minimum wage. The testimony relates to an entirely different subject, viz., the payment to the red caps of certain back pay found to be due to them as a result of a change in the method of computing their working hours.

The necessity of presenting a clear and orderly statement of the pertinent facts has made it imperative to disentangle the confusion which runs throughout the Statement of Facts in petitioner's brief. Further assistance to the Court may be provided by summarizing the results of the foregoing review of the record, as follows:

1. The notice placing the Accounting and Guarantee Plan in effect was delivered to the red cap employes of defendant before October 24, 1938.

2. An agreement had been made between the defendant and the Brotherhood of Railway Clerks in February, 1937, which expressly excepted "individuals performing personal service not a part of the duties of the company." The Director-General of Railroads had held that the service performed by red caps is personal service not a part of the duty of the carrier. At the time said agreement was made between the Terminal and the Clerks, the Clerks did

not represent, and did not claim to represent, red caps.

3. On October 25, 1938, Wooten, General Chairman of the Clerks, wrote to Wilkes, President of the Terminal, claiming that red caps were covered by the Clerks' agreement of February, 1937.

4. On October 27th, Wilkes replied to Wooten, denying the claim and stating that he would not recognize any representation of the red caps unless the red caps had a voice as to who should represent them.

5. On November 3, 1938, Wooten's organization received the authority of the red caps employed by the Terminal to represent them. On the basis of this authority, Wilkes commenced to negotiate with Wooten. On November 14th, Wooten wrote Wilkes proposing to draw and sign a contract covering red caps, since Wilkes was not willing to agree that the Clerks' existing contract should cover them.

6. On November 16th and November 26th, Wooten advanced to Wilkes the claim that red caps were covered by the existing Clerks' agreement until a separate agreement covering them should be made. On December 7th, Wooten complained to Wilkes because the latter was not applying the seniority provisions of the Clerks' agreement to red caps.

7. On June 16, 1939, an agreement covering red caps was concluded between Wilkes, representing the Terminal, and Wooten, representing the red caps. This agreement did not purport to be, and was in

fact shown by its contents not to have been, in any sense an amendment of the Clerks' agreement of February, 1937. Furthermore, the red caps to whom it applied were stated to be those "who are not already covered by agreement."

8. The agreement of June 16, 1939, just referred to, contained no provisions respecting wages, because Wilkes steadily refused to accede to Wooten's demand, made in his letter of November 30, 1938, that the red caps should be paid directly by the defendant an amount equal to the full minimum wage as well as permitted to retain for themselves the sums paid by the public for their services.

9. Between June 16, 1939, and July 1, 1940, Wooten and Wilkes continued to confer from time to time respecting wages, neither being willing to give in to the other's claim, and both agreeing that whether or not the red caps were legally entitled to the full minimum wage, in addition to the amount received from the public, was a question which must ultimately be decided by the courts.

It is submitted on the basis of the foregoing facts that:

1. Plaintiffs are in error in contending that on October 24, 1938, the date of the notice which put the Accounting and Guarantee Plan into effect, there was in existence between the Terminal and its red cap employes a collective agreement which the notice attempted to alter by unilateral action.

2. Plaintiffs are in error in contending that the Clerks' agreement entered into between the Terminal and the Brotherhood of Railway Clerks in February, 1937, covered red cap employes.

3. Plaintiffs are in error in contending that the Terminal's recognition of the Brotherhood of Railway Clerks as the bargaining representative of the red caps involved a recognition or admission by the Terminal that the red caps were covered by the Clerks' agreement of February, 1937, since the Terminal's recognition of the Clerks' organization as the bargaining representative of the red caps was based upon the specific authorizations obtained by that organization from the red caps on or about November 3, 1938, and operating only from that date.

4. Plaintiffs are in error in contending that the agreement entered into in June, 1939, between the Terminal and its red cap employes was an amendment to the Clerks' agreement of February, 1937.

5. Plaintiffs are in error in contending that the Terminal waived or abandoned the Accounting and Guarantee Plan by conferring with Wooten on the subject of wages, or by admitting that the legality of the Accounting and Guarantee Plan would ultimately have to be passed upon by the courts.

6. Plaintiffs are in error in asserting that the Terminal neglected or refused to make good its guarantee under the Accounting and Guarantee Plan until the

latter part of July or the middle of August, 1939, and in asserting that the first money received by the red caps from the Terminal was subsequent to August 15, 1939.

INTRODUCTION TO ARGUMENT.

Plaintiffs in this Court are relying upon two main contentions, which are hereinafter set forth. The first of these was plainly and fully presented to both the courts below and rejected expressly in the opinions of both. The second was urged below with such indistinctness and indefiniteness, and with such fluctuations of meaning and argument, that neither of the courts below passed on it, and it is now presented to this Court in a wholly new and different form.

The plaintiffs' first main contention is that, because the defendant, prior to the notice of the Accounting and Guarantee Plan on October 24, 1938, had permitted the red caps who worked in and about its station to retain as their own the compensation which they received from the public for their services, the status of such compensation was thereby permanently fixed and established as that of gifts or donations from the public to the red caps, which thus became the absolute personal property of the latter; that this status could not be altered by act of the defendant by notice or otherwise; and that, therefore, after the notice of October 24th, as before, the sums received from the public by the red caps continued to be their absolute personal property and so could not be applied by the

employer on the wages which by Section 6 (a) of the Fair Labor Standards Act the employer was required to pay. This contention was fully considered by both courts below, discussed in their opinions, and definitely and expressly rejected by both.

The second main contention which is presented by the plaintiffs in their brief in this Court is that the defendant's notice of October 24, 1938, instituting the Accounting and Guarantee Plan, was ineffective and inoperative because it was in violation of Section 2, seventh, and Section 6 of the Railway Labor Act. Section 2, seventh, provides:

> "No carrier * * * shall change the rates of pay, rules, or working conditions of its employes, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6 requires the intended changes, after due notice, to be negotiated in conference between the employer and representatives of the employes. Plaintiffs now urge that the introduction of the Accounting and Guarantee Plan was a change introduced, or attempted to be introduced, by the defendant without such negotiation, in violation of these statutory provisions.

In the District Court plaintiffs made no reference whatever to the Railway Labor Act and made no argument based upon its provisions. Instead they merely urged that the defendant could not by its notice require the red caps to report and account for their so-called tips, against the "protest" of the red caps

and their "refusal to accede" to the plan. That this was the substance of the plaintiffs' contention is shown in the record by the grounds urged in the plaintiffs' motion for a new trial (R. 204-206), which contain no reference to the Railway Labor Act, just as there is no reference to that Act in the complaint (R. 1-5), the "transcript of proceedings" (R. 189-194), or in the court's opinion, findings of fact, or conclusions of law (R. 195-203).

The plaintiffs' contention in the District Court with respect to this part of the case was most clearly expressed in numbered paragraphs 10 and 14 of their motion for a new trial, which read as follows:

> "10. The court overlooked the protest of the men at all times and the refusal of the men to accede to the appropriation of their tips.
>
> "14. That the court overlooked the fact that it was stipulated by counsel for respective parties that these Red Caps were employees of the Terminal Company under the terms of the Fair Labor Standards Act and the contention of the Red Caps prior to the effective date of the Act was that the tips belonged to them and not the Terminal Company, and requested the company to pay them the minimum wages" (R. 205).

This argument rests upon a presupposition of fact not supported by the record, insofar as it implies that the red caps individually at any time protested or refused to accede to the Accounting and Guarantee Plan, or that individually or through a collective representative they requested the company, before

the effective date of the Act or before the notice of October 24th, to pay them the full statutory minimum wage in addition to their so-called tips. That the red caps did not individually refuse to accede to the plan is shown by the fact that after the notice of October 24th they commenced, and at all times thereafter during the period covered by this action continued, to work under and in accordance with the plan, reporting their tips and accepting the additional sums paid to them by the defendant to make good its guarantee under the plan. That they did not collectively protest or contend that the tips belonged to them personally, either prior to the effective date of the Fair Labor Standards Act or prior to or at the time of the notice, is shown by the fact that they did not before November 3, 1938, have any authorized collective bargaining representative (see Statement above, page 22).

What the plaintiffs' argument in the District Court was apparently intended to mean was that, if the red caps were employes of the defendant at the effective date of the Fair Labor Standards Act, the defendant could not lawfully require them to account for their tips without first obtaining their consent expressed by and through a collective bargaining representative. Plaintiffs in the District Court did not contend that, either at the effective date of the Act or at the date of the notice which introduced the Accounting and Guarantee Plan, they were represented by an authorized collective bargaining representative or had any collective bargaining agreement with the defend-

ant. The form of their argument assumes that, although they were not so represented on those dates, nevertheless the defendant was legally incapacitated to place the Accounting and Guarantee Plan in effect until such representative should subsequently be appointed and give its consent to the plan. This appears to be substantially the same argument as that which prevailed with Judge Atwell in *Pickett et al. v. Union Terminal Co. of Dallas,* in the District Court for the Northern District of Texas, (33 F. Supp. 244, 1940), which is now here on appeal in conjunction with the instant case.

The Railway Labor Act made its first appearance in the plaintiffs' case in their brief in the Circuit Court of Appeals, but so indistinctly that that Court in its opinion did not even refer to it. Plaintiffs' contention as then presented was that, since the red caps had for many years been working for the Terminal and had been permitted during the entire period to retain their tips, this constituted an alleged "verbal" working agreement. Plaintiffs on this assumption thereupon proceeded to argue:

> "Verbal though it may have been, it certainly was the agreement under which they were working, and just as effective as if it had been in writing signed by all the parties involved. The rights of the plaintiffs under their working agreement could not be taken away from them in any such high-handed manner as attempted by the publishing of the notice (*i. e.,* the notice of October 24, 1938, introducing the Accounting and

Guarantee Plan)" (Plaintiffs' Brief in Circuit Court of Appeals, page 21).

Plaintiffs then adduced Section 6 of the Railway Labor Act, and urged that that section invalidated the notice of October 24th as an attempt to alter the so-called verbal working agreement without negotiation, although the provisions of the Railway Labor Act relied on clearly refer, not to verbal or implied working agreements, but only to collectively bargained agreements concluded under the Act between an employer and the duly authorized collective representative of the employes, as will be argued more fully hereafter in the final section of this brief.

Apparently recognizing this fatal defect in their argument as presented in the Circuit Court of Appeals, plaintiffs now in this Court for the first time undertake to claim that there was actually in existence a collectively bargained agreement between the red caps and the defendant at the time of the notice of October 24, 1938. Accordingly, in their brief in this Court they advance the contention, not made in either of the courts below, that on October 24, 1938, and prior thereto, they were covered by and included in the Clerks' agreement of February, 1937, which had been negotiated between the defendant and the Brotherhood of Railway Clerks with reference to other classes of employes. That this claim is not merely unsupported but is definitely disproved by the record has been fully pointed out above in the Statement (pages 22-35). As there is no conflict in the testimony, and the sole question is with respect to the conclusion to be drawn

therefrom, defendant urges that there is no basis whatever for the contention that the plaintiffs had a collectively bargained agreement with the defendant on October 24, 1938, or were then represented by a duly authorized bargaining representative, and that, therefore, the provisions of the Railway Labor Act on which plaintiffs rely have no application to this case because of the complete absence from the record of any facts tending to support such a claim.

In the remainder of this brief, defendant's arguments in reply to the two main contentions of the plaintiffs as above summarized,—viz., (1) the red caps' alleged ownership of the tips, and (2) the argument based upon the Railway Labor Act,—will be presented in the order indicated. Plaintiffs, in their brief in this Court reverse this order and argue, first, the contention based upon the Railway Labor Act (Petitioner's Brief, pages 21-29) and, second, the contention as to the red caps' alleged absolute ownership of the tips (*ibid.*, pages 29-36). However, the original order seems preferable, both because the argument with respect to the ownership of the tips involves the main issues presented by the case and also because the points developed in connection with that argument are necessary to a proper understanding of the argument based upon the Railway Labor Act.

There will first be presented a "summary of argument," followed by the argument itself, which will develop and support each of the propositions set forth in the summary.

SUMMARY OF ARGUMENT.

I.

The defendant, as employer of the plaintiff red caps, was legally entitled to apply on the wages due from defendant to the plaintiffs the sums received by the plaintiffs from the traveling public for services performed as defendant's employes in the course of such employment; and this method of payment complied with the requirements of Section 6(a) of the Fair Labor Standards Act because:

A. Where compensation is received by an employe from the public for services performed as such employe in the course of the employment, the employer and not the employe is entitled to such compensation and may direct and control its disposition.

B. Even if the sums received by red caps from the traveling public for services rendered in the course of their employment should be treated not as compensation from the public for such services, but as "tips" or "gratuities",—which they were not,—nevertheless where tips or gratuities are received by an employe in the course of, and incidental to, his employment, the employer has the legal right to control and direct the disposition of such gratuities and may require them to be paid over or accounted for to him.

C. Since the defendant as plaintiffs' employer was lawfully entitled to control and direct the disposition of the sums received by the plaintiffs from the traveling public either as compensation for services rendered in the course of the

employment or as "tips" or "gratuities," defendant was entitled, in the absence of a collective agreement with the plaintiffs to the contrary, to exercise such control and alter the disposition of such sums without obtaining any other consent from the plaintiffs than was implicit in their continuing to work during pay periods after the altered disposition of such sums had been notified to them, and in their acceptance of the benefits conferred by such notice.

D. The defendant, by permitting the plaintiffs as its employes to retain as their own, sums over which the employer had a legal right of disposition and control, and by making up to the plaintiffs any deficit between such sums and the minimum statutory wage, has "paid" them in accordance with the requirements of Section 6 (a) of the Fair Labor Standards Act, and such payment fully complies with the requirements of that section as reasonably and properly interpreted in the light of the policy and intent of the Congress.

1. The words in which the statutory obligation to pay wages is expressed, when given their normal and ordinary legal meaning, do not require the manual delivery of money directly by the employer to the employe in amounts equal to the statutory wage rates, since on principles of common law a debt, and hence a wage, may be "paid" not merely by the delivery of money, but also by the transfer to the creditor of certain kinds of claims against third persons, viz., checks, if these result in the receipt of money from such third persons, and *a fortiori* by surrendering or for-

giving to the creditor an obligation to account for money which the creditor owes to the debtor.

2. It was the intent and policy of the Congress, in enacting the minimum wage provisions of the Fair Labor Standards Act, to require the employer to provide the employe with means sufficient to defray the cost of a minimum standard of decent living; and the minimum wage provisions of the Act should be construed according to that intent, in preference to a construction which would disregard the intent of the Congress and would require the employer to pay the employe at a substantially higher rate than that fixed by the Act.

(*a*) The history of minimum wage legislation shows that the purpose of such legislation has always been to insure to the employe the means sufficient to provide a minimum standard of decent living.

(*b*) The legislative history of the Fair Labor Standards Act, and the face of the Act itself, show that its only purpose was to insure to workers the means sufficient to meet the cost of a minimum standard of decent living, and not to impose additional burdens on the employer.

(*c*) Construction of the minimum wage provisions of the Fair Labor Standards Act in accordance with its purpose makes it clear that payment to the plaintiffs under the Accounting and Guarantee Plan was in compliance with the Act; and such a construction is to be preferred to the plaintiffs' construction, which would disregard the pur-

pose of the Act and would result in the payment of more than the minimum wage required by the Act.

3. The fact that defendant's construction of the Fair Labor Standards Act is in accord with the purpose of that Act is confirmed by the construction given to other social legislation, whereby tips have been regarded as equivalent to wages paid to the employe by the employer.

II.

The provisions of Section 2, seventh, and Section 6 of the Railway Labor Act, as amended, do not support the conclusion that the defendant, in paying wages to the plaintiffs under the Accounting and Guarantee Plan, failed to comply with the Fair Labor Standards Act.

A. Section 2, seventh, and Section 6 of the Railway Labor Act have application only to changes in an existing collectively bargained agreement.

B. There was no collectively bargained agreement in existence between the plaintiffs and the defendant when the plaintiffs were given notice of the Accounting and Guarantee Plan on October 24, 1938.

C. Even assuming a collectively bargained agreement between the plaintiffs and the defendant to have been in existence on October 24, 1938, the notice of that date instituting the Accounting and Guarantee Plan effected no change which would constitute a violation of the Railway Labor Act.

1. The notice of October 24, 1938, related to a subject not covered by the agreement of 1937 or any other collectively bargained agreement respecting red caps.

2. The notice of October 24, 1938, did not effectuate or purport to effectuate any change in the method by which the red caps had received their wages up to that time, but only provided for the payment to them of such additional sums as might be necessary to bring the wages in all instances up to the statutory wage prescribed by the Fair Labor Standards Act.

ARGUMENT.

I.

THE DEFENDANT, AS EMPLOYER OF THE PLAINTIFF RED CAPS, WAS LEGALLY ENTITLED TO APPLY ON THE WAGES DUE FROM DEFENDANT TO THE PLAINTIFFS THE SUMS RECEIVED BY THE PLAINTIFFS FROM THE TRAVELING PUBLIC FOR SERVICES PERFORMED AS DEFENDANT'S EMPLOYES IN THE COURSE OF SUCH EMPLOYMENT; AND THIS METHOD OF PAYMENT COMPLIED WITH THE REQUIREMENT OF SECTION 6 (a) OF THE FAIR LABOR STANDARDS ACT BECAUSE:

A. Where Compensation is Received by an Employe from the Public for Services Performed as Such Employe in the Course of the Employment, the Employer

and not the Employe is Entitled to Such Compensation and May Direct and Control its Disposition.

The sums which prior to and during the period covered by this action were paid by the public to red caps for their services at or about railroad passenger stations differed from the commonly understood "tip" or "gratuity" in that, unlike tips given to waiters or taxicab drivers, they were not extra or supplemental amounts over and above the price of a service, but were themselves the sole compensation paid for the service, by those who received it, nothing additional being paid to anyone. The defendant's notice of October 24, 1938, expressly referred to them in two places as "remuneration" for service (Pl. Ex. 18, R. 55, 121).

Plaintiffs contend that the sums thus paid by the public to the red caps were gifts, and throughout their brief refer to them as "gifts" (Specifications of Error No. 2, Petitioner's Brief, page 18), and "donations" (Specifications of Error No. 5, Petitioner's Brief, page 19), and speak of their "gratuitous" character (Specifications of Error No. 7, Petitioner's Brief, page 19). The horn-book legal definition of a gift is:

> "A voluntary transfer of property by one to another without any consideration or compensation therefor" (28 C. J. 620, citing cases).
>
> "A gift * * * not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift" (28 C. J. 620).

As stated by this Court:

> "A donation is a gift and gratuity, and not a grant * * * founded on a consideration." *Forsyth* v. *Reynolds*, 15 Howard 358, 365 (1853).

Clearly, a payment made as the result of obtaining service, and which would not have been made if the service had not been rendered, is not without consideration, and is therefore not a gift or donation, but remuneration or compensation for the service in the ordinary meaning of those words.

It may possibly be contended that the so-called "tips" given to red caps were a mere token of gratitude for promptness and courtesy. On this view, however, there would be compensation for the promptness and courtesy without any compensation for the actual service itself. The view would require the conclusion that, during the period when red caps were remunerated exclusively by tips, the passengers who employed them were being supplied with a free service by the railroads, and, while making no compensation for that service, were at the same time compensating the employes through whom the service was performed for their promptness and courtesy. Such a view is not only artificial and unrealistic, but would obviously lead to very grave consequences for the railroads. Neither before nor after the red caps were declared employes by the order of the Interstate Commerce Commission have the railroads of this country ever held themselves out as offering a free red cap service to the public. The Interstate

Commerce Commission in a recent decision has expressly held that red cap service is not, and never has been, a free service offered by the railroads to their passengers or included in the price of the transportation (*Stopher* v. *Cincinnati Union Terminal Co.*, 246 I. C. C. 41, decided June 25, 1941).

The practical result of adopting a view which would entail as one of its consequences that the railroads have been offering or making available to the traveling public free red cap service would obviously impose so onerous a burden on vanishing passenger revenues that it is altogether unreasonable to assume that the railroads ever intended to offer such service free. Prior to the Commission's decision that red caps were employes, the railroads regarded the service not as one which they themselves supplied but rather as a service which they made it possible for independent concessionaires, the red caps, to render to such of the public as were willing to pay for the same, although the amount was not fixed but left to the discretion of the passenger.

Accordingly, the Court of Appeals found and stated in its opinion (118 F. (2d), at page 326):

> "In every case the tip was primarily a compensation for service, and not a gift. The red cap expected nothing unless he served. No passenger ever gave a red cap anything unless there was service. Every passenger paid for service unless he or she was very stingy or financially unable, or else ignorant that pay was expected. The acceptance of service carried an expectation of

reward on both sides. What the red cap received was not gifts but earnings. If they amounted to enough he owed income taxes on them; and they belonged to him, either because the business was his, or if an employe, because his employer conceded them to him." (R. 218).

Plaintiffs refer in their brief to the regulation in effect at the defendant's station, as well as on other railroads, that red caps were not permitted to ask passengers for tips or gratuities (Petitioner's Brief, page 5), and seek to draw from this the inference that the service was offered gratis to the public. The regulation does not support such an inference. It was a regulation that red caps were not to enter into controversy with the occasional and unusual passenger who, after receiving the service, failed to pay, and is clearly only a regulation designed to avoid unseemly controversy with patrons and to preserve an atmosphere of courtesy in relations with the traveling public. As such it was imposed as a condition of being permitted to work on the defendant's premises, and it was so understood by the Circuit Court of Appeals, which says in its opinion (118 F. (2d), at p. 325):

> "Prior to October, 1938, these red caps, like others at many larger railroad terminals throughout the United States, were selected on their applications, by Jacksonville Terminal Company, furnished with uniforms which included red caps, and permitted to offer their services * * * to the passengers taking or leaving trains; they to

look wholly to the passengers for their pay, but not to demand or argue about it but to take what was offered" (R. 215).

And again (p. 326 of 118 F. (2d)):

"The railroad carriers were not bound to afford any such service to the passenger, and the reward of it was left a matter between red cap and passenger, with the stipulation that the amount should be left to the passenger and there should never be annoyance or embarrassment about it" (R. 217).

From the standpoint of common experience the best proof that the railroads never intended to offer free red cap service to their patrons is the fact that, if they had made such an offer, the number of red caps maintained in and about their stations would have had to be greatly multiplied. That the service was not intended to be free has always been understood by the traveling public, and persons not intending to pay for red cap service have seldom, if ever, demanded it. Again quoting the words of the opinion of the Circuit Court of Appeals, "the acceptance of service carried an expectation of reward on both sides" (R. 218).

The public authorities which for many years have regulated the transportation service offered by the railroads have never assumed to require the offer, or to regulate the amount, of red cap service.

Since the sums received by the red caps, including the plaintiffs, from the traveling public prior to

October 24, 1938, were thus compensation for the service, it follows that, if the red caps were employes of the defendant during that period, or at any event from the time that they were declared and became employes, such sums belonged to the employer and were subject to his control and disposition.

It is elementary law that the earnings of an employe made in the course of, or as a result of, his services performed as such employe belong to the employer:

> "Plaintiff's earnings during the time of such employment would belong to the employer." (*Leach* v. *Hannibal & St. Joseph R. Co.*, 86 Mo. 27, 32, 1885.)
>
> "For any service to an outside party which plaintiff rendered for a consideration, the master, and not the servant, would be entitled to recover." (*Reynolds* v. *Roosevelt*, 55 Hun 610, 8 N. Y. Supp. 749 (1890).)

The same proposition was laid down and applied in *Morrison* v. *Thompson*, L. R. 9 Q. B. 480 (1874), where the court, through Lord Chief Justice Cockburn, said (p. 483):

> "Profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belong to the master or principal," citing earlier English decisions.

So basic is this proposition that like many other elementary propositions of law there are relatively few decided cases which announce it. One such case is *Sheppard Publishing Co.* v. *Harkins*, 9 Ontario L. R. 504 (1905), in which the court said at page 511:

> "As money obtained by the servant by the sale of time and labor which belonged to his master, and therefore, in contemplation of law, the proceeds of the master's property, his right to follow and demand them may be upheld. *Taylor* v. *Plumer* (1815), 3 M. & S. 562. I am bound, I think, to hold the profits so made by a servant to be in his hands the property of his master for which the servant must account to him."

Accordingly, plaintiffs' own contention that they were and had always been employes of the railroads at whose stations they served prior to the order of the Interstate Commerce Commission in *Ex Parte 72*, requires the conclusion that during that whole period their compensation received from the public in the course of and as a result of such employment belonged to their employer, and that, if during that period they retained such compensation as their own, this was by the consent and permission of the employer, and in lieu of the wages which the employer might otherwise have been expected to pay to them directly. It is, therefore, unnecessary to go into the question of whether the red caps were licensees or employes before the Interstate Commerce Commission's decision. Certainly, as soon as they became such employes, whether by virtue of that decision or at a prior time, the compensation received by them in the course of the employment belonged to and was subject to the disposition and control of their railroad employers, including the defendant. This, of course, remained true after the enactment of the Fair Labor Standards Act, which required the employer to pay them a specified

wage of not less than certain fixed sums per hour. Again, the language of the Circuit Court of Appeals in the instant case may be quoted (118 F. (2d) at p. 326):

> "Since the employer became absolutely bound to pay these sums for those hours and for the labor to be done in them, necessarily the work was his, and the product of it was his. The employer did not have to consent to this, nor did the employe. * * * Because what was received from passengers was not gifts but pay for services valued by the passenger, it required no consent on the part of the red caps to make the earnings belong to the employer, who was now bound to pay for the time and efforts of the red caps during work hours. The red cap's reward was to be wages. The employer became entitled to his services and what was received for them" (R. 218-219).

B. Even if the Sums Received by Red Caps from the Traveling Public for Services Rendered in the Course of Their Employment Should be Treated not as Compensation from the Public for Such Services, but as "Tips" or "Gratuities,"—Which They Were not,—Nevertheless Where Tips or Gratuities are Received by an Employe in the Course of, and Incidental to, his Employment, the Employer has the Legal Right to Control and Direct the Disposition of Such Gratuities and May Require Them to be Paid Over or Accounted For to Him.

The Circuit Court of Appeals recognized that no precise and uniform definition of tips is to be obtained

from dictionaries or the language of decided cases. As the Court states in its opinion (118 F. (2d) at p. 326):

> "It would seem that a tip may range from a pure gift out of benevolence or friendship,* to a compensation for a service measured by its supposed value but not fixed by an agreement. Most often the term is applied to what is paid a servant *in addition* to the regular compensation for his service, to secure better service or in recognition of it" (R. 217).

It has been established in the immediately preceding section of this brief that the sums paid by the traveling public to red caps, whether or not properly described by the term "tips," belong at that end of the scale where the term describes "compensation for a service," and thus differ from the tips paid to waiters and taxicab drivers, which are in addition to the regular compensation for the service. However, even if this difference should be ignored, and the "tips" paid to the red caps be treated as on all fours with the extra or supplemental payments by patrons to waiters and taxicab drivers, the legal consequence still follows that the employer has a right to control the disposition of such sums received by the employe in the course of, and as a result of, the employment, and may either forbid the employe to receive such tips or require that they be turned over to the employer.

* In this connection may be cited the familiar literary employment of the word to describe the gifts to English schoolboys by their parents' friends.

It has been held that an employer may require, as a condition of employment, that an employe shall turn over to him amounts received as tips in the course of the employment (*Gloyd* v. *The Hotel LaSalle Co.*, 221 Ill. App. 104 (1921)). In *Ex Parte Farb.*, 178 Cal. 592, 174 Pac. 320 (1918), it was held that a state legislature may not constitutionally deprive an employer of the right to impose such a requirement. The same case held that an employer may forbid an employe to accept any tips under pain of dismissal for disobedience. To the same effect is *Powers' Case*, 275 Mass. 515, 176 N. E. 621 (1931). Statutes have been sustained and applied which fully recognize this right of the employer to forbid his employes to accept tips, and which penalize certain classes of employers, such as hotels, restaurants, railroad companies and sleeping car companies, that allow employes to receive tips. *Laws of Mississippi*, 1912, ch. 136, construed in *State* v. *Angelo*, 109 Miss. 624, 68 So. 918 (1915).

In *Sloat* v. *Rochester Taxicab Company*, 177 App. Div. 57, 163 N. Y. Supp. 904 (1917), (aff'd without opinion, 221 N. Y. 491, 116 N. E. 1076 (1917)), the court, in estimating the weekly benefits due to a taxicab driver under the New York Compensation Law, decided that tips were a part of his wages and held that an agreement with the employer to that effect may be implied from a common custom or understanding in the business. The court said (163 N. Y. Supp., at pp. 905-6):

> "There was a custom existing in the City of Rochester whereby users of taxicabs, upon paying

their fare, gave to the drivers gratuities or tips, which is an amount in addition to the fare, and for the personal use of the driver; that such custom was known to the employer at the time he employed Warren Sloat to enter his service; that the average amount of tips so received * * * was the sum of 85 cents a day, which sum he was allowed to keep for his own use, and was not required to account to his employer for the same. * * *

"It is urged that these tips were received, not from the employer as wages, but from the patrons of the taxicab, as a gratuity or gift to the driver * * * The employer and employe knew that an average of about 85 cents per day would be received from tips, and clearly the compensation paid by the employer was based upon that assumption. If the employe had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employe undoubtedly would have been $17.10 a week. If the employe receives from the employer $12.00 and retains the $5.10 tips, he is getting through or from the employer $17.10 per week; and if the employer paid the employe $17.10 a week, and the tips were turned over to the employer, the result to each would be the same. Neither the employer nor employe contemplated that the employe should receive but $12.00 for his services; each expected that he would receive on an average $17.10 per week.

"The employe could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the

tips were an advantage received from the employer similar in effect to board, lodging, or rent furnished in addition to the money wages paid. * * * The usual tips have come to be considered a part of the cost of the entertainment at a hotel or upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages, which the employer compels the person served to pay. In effect, therefore, the employer, and not the employe alone, is benefited by the tip usually paid. * * * The whole theory of tipping, as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer, so that his patrons shall help him pay the wages which is fairly due from him to his employe. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that, in substance, the tips received are a part of the wages of the employe, and are advantages received by the employe from the employer as a part recompense for services rendered. * * * Award affirmed."

Similarly in *Bryant* v. *Pullman Company*, 188 App. Div. 311, 177 N. Y. Supp. 488 (1919) (aff'd without opinion, 228 N. Y. 579, 127 N. E. 909 (1920)), it was held that tips received by a Pullman car porter are understood by the porter and the company to be part of his wages and should be considered as such in determining the compensation to which he is entitled under the same Workman's Compensation statute. The Court said (177 N. Y. Supp., at p. 489):

> "It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from *Sloat* v. *Rochester Taxicab Company,* 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. * * * Such is the common understanding. The award should be affirmed."

In *Gross' Case,* 132 Me. 59, 166 Atl. 55 (1933), the issue on appeal was whether, in ascertaining the average weekly wages or earnings of a waitress, tips received and retained by her should be considered. It was undisputed that under her contract of employment she could retain her tips. The Board included her tips and found her average weekly wages to be $17.13. After considering and citing from many compensation acts and the decisions thereunder, under which tips were included in the computation to arrive at the average weekly wages of the employe, the court pointed out (166 Atl., at p. 56):

> "A further provision of our act is that, in determining the compensation to be paid, benefits received from any other source than the employer shall not be taken into consideration."

Thereupon the court, quoting from the *Sloat* case, *supra,* to the effect that the "whole theory of tipping" is that the patrons thereby help the employer pay the employe's wages, held that the tips were properly included as wages, and dismissed the appeal.

At this point it is appropriate to call the Court's attention to language used in Judge Waller's opinion in the instant case in the District Court. In that opinion Judge Waller said (35 F. Supp. at p. 270):

> "In the instant case it has not been disputed that the station and the passengers were facilities furnished by the employer without which there would neither be employe nor wages.
>
> "The terminal station, with all its facilities, belonged to the defendant. It had the legal right to deny the use of those facilities to persons who would use it as a place of business. It likewise had the legal right to extend a privilege to any one it saw fit who would observe appropriate rules and regulations and otherwise observe the conditions under which the privilege or license was granted. It had the legal right to exact payment from concessionaires using its facilities for profit, and to require the observance of its known and reasonable regulations; or it had the legal right to waive the payment of a consideration. * * *
>
> "However, if we concede that they were employes and within the Act, we would still find that, in cash paid directly and through the facilities furnished by the employer, plaintiffs have been paid, in the aggregate, considerably in excess of the minimum wages required by said Act. *It would seem immaterial whether the employe was paid by the employer directly or whether he was paid through an instrumentality or facility set up for his use and benefit by the employer.* The question is, did he receive, either directly or indirectly, for his services a sum not less than the minimum required by the Act. * * *" (R. 200-20). (Emphasis supplied)

Plaintiffs in their brief (Petitioner's Brief, page 32) cite *Polites* v. *Barlin*, 149 Ky. 376, 149 S. W. 828 (1912), and *Zappas* v. *Roumiliote*, 156 Iowa 709, 137 N. W. 935 (1912), in support of the proposition that tips are the absolute personal property of the employes in such sense that the employer has no right of control over them. Those cases do not rest upon or establish that proposition. What they do establish is simply that the employe is entitled to retain the tips so long as the employer has not exercised his right of control by explicit and proper notice to the employe, and so long as it cannot be shown that the employer has by such notice established, as a condition of the employment, a requirement that the employe shall turn over the tips to him. The holdings of both cases, understood in the light of their facts, mean no more than that an employe cannot be held to a rule or regulation of the employer not properly brought to his attention and so not forming a part of his individual employment contract. There was in one, if not both, of these cases the added element of concealment by the employer, and more than a suspicion that an advantage had been taken of an ignorant foreigner who could not speak the language.

These cases thus do not deny, but on the contrary expressly affirm, the right of the employer, by proper notice to the employe, to make it a term of the employment contract that the employe shall henceforth, if he continues in the employment, turn over his tips to the employer or account for them.

There was a similar absence of prior notice by the employer, and so of an exertion of his right to control the tips or commissions, in the other three cases cited by plaintiffs in their brief (Petitioner's Brief, page 33), viz.: *M'Rae* v. *M'Beath*, 5 N. B. 446 (1847); *Gay* v. *Paige*, 150 Mich. 463, 114 N. W. 217 (1907); and *Aetna Insurance Co.* v. *Church*, 21 Ohio St. 492 (1872). The decisions in all these cases were concerned with a question not in issue here, viz., whether, *in the absence of proper notification to the employe*, tips or commissions belong to the employer or to the employe—*i. e.*, whether the employer's explicit permission is necessary before the employe may lawfully retain the tips or commissions, or whether, on the other hand, the employe may lawfully retain them until he has received explicit notice from the employer to the contrary. This question is not involved in the case at bar. The decisions cited do not challenge in any way the employer's right to control the status of tips; they merely involve the question of when and how the employer's right to demand payment over of the tips is to be exercised. The issue upon which they thus turn is not presented in the case at bar, since here there is no dispute as to the right of the plaintiffs to retain the tips which they received prior to the full and explicit notice given them by the defendant on October 24, 1938.

The service of that notice upon each of the plaintiffs was an express assertion of the defendant's right of control with respect to tips, and notified them specifically that it was by the defendant's consent

that they were permitted to retain the income derived by them from serving the defendant's patrons. The notice, although it permitted the red caps to retain the tips precisely as before, was a definite direction and order from the employer to the employe which placed the status and ownership of the tips beyond doubt.

The record shows that after the receipt of the notice each of the plaintiff red caps continued to work on the premises of the defendant and duly complied with the notice by making daily reports of the tips which he received. The defendant complied with its guarantee set forth in the notice by paying to the plaintiffs the difference, if any, between the amounts which they received from the public and the amount of their statutory minimum wage, and the plaintiffs received and accepted these payments in accordance with the terms of the notice (Def. Bill of Partic., R. 13-44).

The right of a carrier-employer of red caps in the position of the defendant to control the disposition of the tips received by the red caps from the public has been forcefully expressed by Judge Otis in his opinion in *Harrison* v. *Kansas City Terminal Railway Co., supra.* His language is as follows:

> "Defendant was under no obligation to employ redcaps. In the great majority of railway stations no such service is provided. *When the defendant did employ redcaps it had the right to fix the conditions of their employment (except as Congress legally may have prescribed conditions). It had the right to say what duties they should perform, how they should perform them, when they*

should perform them. It had the right to say whether they should take or refuse tips when offered. It had the right to require them to turn over to it all tips received" (36 F. Supp., at p. 438)." (Emphasis supplied).

After referring to the employer's notice, which was in all respects like the defendant's notice of October 24th, but which in the *Kansas City* case was dated October 21, 1938, and to the fact that the red caps continued to work under the notice, Judge Otis proceeds as follows:

> "They" [*i. e.*, the red caps] "consented and agreed to whatever clearly was stated in the announcement and to whatever clearly was implied in what was stated. None seriously would contend that the red caps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act. None seriously would contend that the red caps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employe to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the red caps that they were 'privileged to retain * * * tips.' To grant a privilege is to assert the right to grant it. To grant the privilege of retaining tips is to assert the right to demand that they be paid over. The privilege

of retaining tips was granted but the grant was not unconditional. *The red caps understood what the condition was. They understood and they accepted it.* They were to retain the tips subject 'to their being credited on such guarantee.' On what guarantee? On the guarantee that the compensation of each red cap 'will not be less than the minimum wage provided by law.' *Here was an assertion by the defendent of a claim it had a right to assert, a claim to the tips received by the red caps. Here was an arrangement by which the red cap, when he had received a tip, held it in his custody for the benefit of his employer until he had given his employer credit on his wage, after which it become his separate property*" (36 F. Supp., at p. 349). (Emphasis supplied)

The foregoing discussion by Judge Otis of the red caps' acceptance of the notice of the Accounting and Guarantee Plan involved in their continuing to work thereunder, and in their acceptance of the benefits of the plan, leads to the next proposition of this argument, viz.:

C. Since the Defendant as Plaintiffs' Employer was Lawfully Entitled to Control and Direct the Disposition of the Sums Received by the Plaintiffs from the Traveling Public either as Compensation for Services Rendered in the Course of the Employment or as "Tips" or "Gratuities," Defendant was Entitled, in the Absence of a Collective Agreement with the Plaintiffs to the Contrary, to Exercise Such Control and Alter the Disposition of Such Sums without Obtaining any other

Consent from the Plaintiffs than Was Implicit in their Continuing to Work during Pay Periods after the Altered Disposition of Such Sums had been Notified to Them, and in Their Acceptance of the Benefits Conferred by Such Notice.

The quotations reproduced in the foregoing section of this brief from Judge Waller's opinion in the District Court in the instant case, and from the opinion of Judge Otis in the *Kansas City* red cap case, state clearly and forcefully the right of the employer to assert and exercise by due notice to his employes his control over the tips received by them from the employer's patrons in the course of their employment. Of course, the employe, after receiving the notice and being thereby informed of the condition with respect to tips thereafter to be attached to his employment, is free to leave the employment if he does not like the condition and is unwilling to accept it, or be employed on such terms. If he does not do so, however, and instead continues in the employment from pay-day to pay-day thereafter, he must be taken to have accepted the employment on the terms and conditions set forth in the notice, and thereafter those terms and conditions become part of his individual employment contract.

A different question would, of course, be presented if at the time of the notice the employe was working under a collectively bargained agreement with the employer, and if the notice purported to alter some provision or provisions of that agreement. This is

not, however, the situation at present under consideration. No question of a collectively bargained agreement purporting to be in effect and to cover the plaintiffs on October 24, 1938, when the defendant issued the notice putting the Accounting and Guarantee Plan in effect, was presented to either of the courts below in the instant case. In so far as that question has now been raised for the first time in this Court, it will be argued in the final section of this brief (pp. 136 to 158, below). In the present section the argument is confined to the proposition that, leaving the question of such collective agreement aside, the only consent of the plaintiffs needed to make the notice of October 24th effective and to incorporate the provisions of that notice in their individual employment contracts, so that they were subsequently bound thereby, is the consent implicit in their continuing to work during pay periods after their receipt of the notice, and in their acceptance of the additional payments from their employer which the notice guaranteed.

The necessity for making any argument in support of what seems so plain a proposition of elementary law arises only from the misconceptions in which Judge Atwell in the District Court for the Northern District of Texas became involved in deciding the case of *Pickett* v. *Union Terminal Co. of Dallas*, 33 F. Supp. 244 (1940), now on appeal in conjunction with the instant case. These misconceptions were the basis of Judge Atwell's decision of that case in favor of

the red caps in the District Court, and, although that decision was reversed by the Circuit Court of Appeals concurrently with its decision in the instant case, 118 F. (2d) 328 (1941), Judge Atwell's opinion, which is the only opinion so far handed down by any court supporting the claims of the red caps, requires examination in order to remove the misunderstandings to which it has given rise and upon which the plaintiffs may attempt to rely in argument here, as they did in the courts below.

Judge Atwell in his opinion expressed the view that, whatever the right of an employer to control the disposition of tips, nevertheless, if he has in fact permitted such tips to be retained by the employes over a period sufficiently long to make such retention a matter of practice, he may not thereafter change the practice without the consent of the employes given in the form of an express contract, and that, if no such express contract has been entered into by the employes, the employer's attempt to change the practice by the giving of notice is ineffectual, even if the employes, after receipt of the notice, continue to work from pay-day to pay-day and accept the benefits which the notice purported to confer. This appears to be the meaning of the following language from his opinion (p. 248 of 33 F. Supp.):

> "For more than thirteen years they" [*i. e.*, the red caps] "had been working together as heretofore indicated; the red caps being paid entirely by tips which they received from the public, when they were paid at all. That arrangement could

not be optionally terminated by one party without the consent and agreement of the other."

If this language means that employes who previously, without receiving direct wage payments, had been permitted by their employer to receive and retain tips as their own property, could not thereafter be required by the employer, upon due notice, to treat the tips so retained as their employer's property applicable to the payment of wages which they were thenceforward to receive, unless the employes made an express contract to that effect, and even though they continued to work under the notice and take advantage of the guarantee which it proffered, then it is submitted that the statement is simply an erroneous expression of the law.

It is well settled by the authorities reviewed above that an employer may forbid an employe to accept any tips, under pain of dismissal for disobedience. Legislatures have required that employers whose employes have previously accepted tips shall from the date of the enactment forbid them to do so, and have penalized employers who fail to comply with the statute and do not enforce such prohibition against employes (see p. 70 above). Obviously an employer would have no such right, nor could the legislature compel him to exercise such a power, if employes who had previously been permitted by their employer to receive and retain tips on their own account could not lawfully be deprived of the privilege, except by their own consent given in the form of an express

contract, as Judge Atwell held. To say that employes who have been permitted by their employer to receive tips must continue to be allowed to receive them, or must continue to be allowed to treat as their own property compensation which the employer has permitted them to retain in the past, is to say that the employer by once granting such permission has thereafter permanently disabled himself from exercising the legal power which he admittedly has over the tips and compensation in question.

Obviously this is not the law. If it were, the anti-tipping statutes would be unconstitutional wherever an employer had previously permitted tipping, and would thus fail completely of their purpose, since the employes would have a vested right which the statute would impair. Since the employer has a legal right of control over money received by his employes from his patrons in the course of their employment, either as gratuities or as compensation for their services as such employes, he is necessarily entitled to exert such control by changes in his rules or regulations applicable thereto upon proper notice of such changes to the employes. This is but an illustration of the general right of the employer to change from time to time the rules and regulations applicable to the employment and to the conduct of his business, and of the duty of the employe, when duly notified of such changes, to comply therewith so far as such changes are reasonable. Clearly it is not necessary, in the absence of a collective agreement to the con-

trary, that an employer, who has pursued certain methods or practices in the conduct of his business, should thereafter have to secure the consent of his employes in the form of an express contract with them before making any changes in those practices.

Possibly a distinction might be drawn between cases, on the one hand, where an employer has contracted with a particular employe or group of employes to keep them in his employ for a definite period of time, say, a year or five years, and, on the other hand, cases where the employment, as is true of red caps, is an employment at will or at most from pay-day to pay-day. In the former type of case it might be argued that the terms of the contract should be construed to incorporate certain particular practices, as, for example, those affecting compensation, so that as to those the employer could make no alteration during the period of the employment without the consent of the employe. The argument would be that the employer could not alter those conditions of work which could properly be treated as an essential term of the contract, because the employe is bound on his part to continue in the employment during the entire duration of the contract and can be held to that obligation by the employer, so that the employe on his own part is entitled to have the contract continue unchanged in essential respects during the period for which he is bound. Even, however, in respect of an employe whose contract of employment is for a fixed period, it has been held that the employer, by establishing new rules and

regulations, and duly notifying the employe thereof, may lawfully effect important changes in the employe's working conditions for the remainder of the duration of the contract. *Marks* v. *Cowdin*, 175 App. Div. 700, 162 N. Y. Supp. 567 (1916); *Smith* v. *Herring-Hall-Marvin Co.*, 115 N. Y. Supp. 204 (1909); *Peniston* v. *John Huber Co.*, 196 Pa. 580, 46 Atl. 934 (1900). In a case of that character it has been said:

> "The law is that a master is entitled to direct how a servant shall perform his duties, and in so doing is entitled to consult his convenience as well as the interest of the business and to prescribe such hours of work for each employe as shall in his opinion best conduce to the efficient administration of the business as a whole. So long as such directions are not unreasonable * * * the servant is bound to obey them." *Macauley* v. *Press Publishing Co.*, 170 App. Div. 640, 155 N. Y. Supp. 1044, 1047 (1915).

But, whatever might be the case with respect to employes hired for a fixed period of some duration, there is clearly no limitation upon the employer's right to alter his practices affecting employes whose employment is terminable at will or on any pay-day. The contract of such employes, having no longer duration than the interval between pay-days, cannot operate to prevent the employer from making rules and regulations which change the conditions of their employment, since the employes must necessarily be regarded as accepting the change if they continue in the employment after the next ensuing pay-day.

Such employes, who are employed from pay-day to pay-day and who are under no obligation to continue in the employment longer than they see fit, have no lawful reason to complain of a change in the working conditions or practices of their employment, because they may leave the service at once if they do not like the change. This is the plain common law of the subject: see, e. g., *The King* v. *St. John,* 9 B. & C. 896, 109 Eng. Rep. 333 (1829); *Spain* v. *Arrot,* 2 Starkie 256, 171 Eng. Rep. 638 (1817). As stated in *Donnellan* v. *Halsey,* 114 N. J. L. 175, 176 Atl. 176, 177 (1935):

> "If the relationship existing between the parties was based on a contract * * * terminable at the will of each party it necessarily follows that it was subject to modification at any time as a condition of its continuance."

It was accordingly held in that case that an employe whose employment was thus terminable at will, and who was paid in part by a percentage of profits from the business, was bound to accept a reduction in such percentage when he continued in the employment after notice thereof. In *Painter* v. *Durham,* 195 Ill. App. 468 (1915), the court stated the rule as being to the effect that if, after notice of the proposed change in the terms of an employment, an employe continues in the service of the employer, he is presumed to have assented to the new contract.

In *Shuppan* v. *Peoria Ry. v. Terminal Co.,* 30 F. (2d) 569 (C. C. A. 7th, 1929), the general manager

of a railroad, upon its release from Federal Control, found that the road could not operate on the wages which had been fixed during the period of Federal Control. He advised the men of this fact and told them that they must either accept a wage-cut or apportion the income of the company among them (after deduction of the cost of current supplies, etc.), or quit the employment. The employes refused to accept any of the proposed alternatives. Thereupon the general manager posted a notice, which, after reciting what had taken place, announced that, beginning on a certain date, the employes "will receive on each pay day your proportionate share of the current income of the Company after allowing for the payment of current bills for fuel, supplies, etc., and that the amount you so receive on each pay day will constitute your full and final compensation for the period covered by such pay day." The employes' committee wrote the general manager advising him that the employes would not accept a less rate of pay than that previously in effect. The company thereafter paid the men in accordance with the formula announced by the general manager in the bulletin, the amounts so paid varying on different pay-days from seventy-five to eighty-two per cent of what the employes had previously received. The checks were stamped in full for services to date. Some of the employes protested individually, and several times the employes' committee filed a formal written protest. But the men continued to work. The Circuit Court of Appeals affirmed the judgment

of the District Court, disallowing a claim by the employes for the difference between the former wage and the amount which they had received, saying:

> "Clearly there was no formal contract between the company and the employes that they would accept a smaller wage than they had been receiving. Looking, however, to the conduct of the parties, the conclusion is inescapable that they did so contract. At the meeting of February 17 the company through its general manager told the employes that operation on the existing basis was no longer possible, and set forth the terms upon which operation might be continued. Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still, no one left the service. By remaining in the employ of the company, they manifested more positively that the proposal that they leave the service was not acceptable."

Another case which holds that, by continuing in the service, the employe accepts a new condition of employment of which notice has been given him by the employer, even though he may expressly protest against it, is *L. G. Balfour Company* v. *Brown,* 110 S. W. (2d) 104, 107 (Tex. Civ. App., 1937), where the court said:

> "Appellee continued in appellant's service with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; but of course this continued service was not without protest; however, an

earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service."

If an attempt should be made to establish as a rule of law that, where employes are simply employed from pay-day to pay-day, the employer cannot with respect to such employes change any rule or practice affecting the employment which has been applied in the past unless the employes, by express contract, consent to such change, the extraordinary result would follow that employes who are under no obligation to remain in the employment, and who can leave it at any time, would have a right, by withholding their express consent to proposed changes, to dictate the business practices of the employer beyond the period during which they are bound to remain in his employ. Such a rule would be lacking in the element of reciprocity of obligation which is basic in the very conception of a contract.

Whether or not the legislature could impose such a rule for the benefit of unorganized employes and in the absence of a collectively bargained agreement, it is clear that, until now, this has not been done. To say that in the absence of a collective agreement an employer may not change practices and establish new rules and regulations without obtaining the express consent of the employes affected, is to say nothing less than that without a collective agreement employes have the very right which it is often one of the principal purposes of a collective agreement to obtain for them. It is to say, in substance, that the mere

fact of their employment, although for no specific duration and although regulated by no collective agreement, gives them as unorganized individuals the same right as that which they could obtain from a collective agreement only if the agreement contained a provision to that effect.

The untenable and impractical character of such a view is disclosed by the consequences which it would entail. Suppose, for example, that an employer has permitted a certain practice affecting a given class of employes, and then announces an alteration in the practice effective from the next pay-day. Suppose it should be decided as a rule of law that the alteration may not be put into effect by the employer without obtaining the consent of the employes given in the form of an express contract. From whom are the consents to be obtained? With whom is the contract to be made? By hypothesis, the employes are unorganized. Must the employer treat with them individually? Suppose that he obtains the consent of some and not of others; is he prevented from putting the change into effect without obtaining the consent of all? On the other hand, if the change could be made effective only as to those employes who were willing expressly to consent to it, and not as to those who refused their consent but still insisted on remaining in the employment, the lack of uniformity which would result with respect to different individual employes might well have the practical effect of preventing the change from being put i to operation. The result would be that a small group, or possibly

even a single employe, would have a veto over the introduction of the change.

In the light of what has been said, it is clear that, at least as to employes not working under an express contract of employment for a fixed term of substantial duration, the employer by notice duly given to the employes may alter the terms and conditions of the employment, unless the alterations in question violate the provisions of an existing collectively bargained agreement with those employes, or unless the new terms and conditions established by the notice are for any reason contrary to law.

In saying that the employer is prevented from putting into effect new terms and conditions which violate the provisions of an existing collectively bargained agreement, it follows that the collectively bargained agreement must actually be in existence at the time the proposed change is announced, and that it must actually contain a provision with which the proposed change comes into conflict. Clearly the impediment does not exist either if there has been no collectively bargained agreement, or if such an agreement exists but contains no provision which the change would violate. These consequences follow from elementary principles of contract law. Clearly, if a collectively bargained agreement is not yet in existence, it cannot be treated as having any of the effects which an existing agreement would have. Accordingly the mere fact that proposals had been made which might ultimately lead to the conclusion of such an agreement, or the fact that negotiations had been

commenced, cannot be treated as having the same effect as a completed agreement, since they might well probe abortive and no agreement result. In any event, until the agreement is actually concluded, it cannot be certain what terms it will contain and whether or not a particular alteration in working conditions will contravene any of the terms of an agreement still *in futuro.*

A fortiori, the mere fact that an individual or organization may have approached an employer, claiming to be the representative of a group of employes with whom a collective agreement has not yet been made, cannot be held to have the same legal effect as a completed agreement might have in preventing the employer from thereafter making any changes in his working rules. Up until the time that an agreement is actually completed, there can be no impediment to the employer's making such changes, for there is no agreement in existence which those changes might contravene, and, when the agreement is subsequently made, the employes have their opportunity to negotiate the question of whether the change shall thereafter be kept in effect.

Precedent as well as principle supports the proposition that, where no collectively bargained agreement has as yet been entered into, the employer may on his own initiative fix and alter rules, working conditions and rates of pay, and the new rules, conditions and rates so established thereafter become a part of the individual employment contracts of the employes

who continue to work thereunder. This has been specifically decided under the provisions of the Railway Labor Act in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592 (1937), where this Court, speaking through Mr. Justice Stone, said at pages 548-9:

> "We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent *collective bargaining* with anyone purporting to represent employes, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employes in the mechanical department, with any representative other than respondent, but *not as precluding such individual contracts as petitioner may elect to make directly with individual employes.*" (Emphasis supplied).

In that case, a specific labor organization, viz., the respondent "System Federation No. 40," had been certified by the National Mediation Board to the employer as the authorized and accredited representative of a certain class of employes for collective bargaining purposes. This organization brought suit, alleging, among other things, that the employer threatened to negotiate and conclude a collective agreement with another and different labor organization as the bargaining representative for the same employes. This, the Court held, the employer might

not do, but limited the scope of the injunction in the sense indicated in the passage from the opinion quoted above. The portion of the Government's brief approved in that passage, and cited by the Court in a footnote (p. 548), reads in part as follows:

> "When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a *collective contract (i. e.*, a contract which sets rates of pay, rules or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules or working conditions."

In other words, as the passage just reproduced indicates, since a collective contract may never eventuate, it is clear that, until such a contract is made, the employer is free to determine the rates of pay, rules or working conditions applicable to his employes by terms incorporated in their separate individual contracts of employment, even after a collective bargaining representative has been duly authorized and accredited. The thing which such authorization prevents him from doing is merely the making of a collective agreement with any other representative or alleged representative.

On the facts of the case at bar, as summarized in the Statement above (pages 24-34, *supra*), it is not possible for the plaintiffs to claim either that negotiations were in progress, or even that anyone purporting to act as the plaintiffs' representative had yet approached the defendant, at the date when the Accounting and Guarantee Plan was put into effect. The notice instituting that plan was delivered to the plaintiffs before October 24, 1938. It was not until October 25, 1938, that Wooten advanced his claim to represent the plaintiffs, and it was not until after he had secured proper authorizations from them on November 3rd that his claim was recognized by the defendant. Only after that date did actual negotiations begin. Even, therefore, if the mere existence of an authorized collective bargaining agent or the commencement of negotiations should be held—as is clearly not the law—to prevent an employer from introducing changes in the working conditions affecting the employes represented, this impediment did not exist at the time of the notice of October 24th. The fact, therefore, that the plaintiffs continued in their employment after receipt of the notice, and accepted during the entire period covered by this action the payments from the defendant which the notice proffered, must be held to have constituted whatever consent on their part was needed to make the notice operative. Only if there was actually in existence on October 24, 1938, a collective bargaining agreement between the plaintiffs and the defendant,

and only if the notice of October 24th attempted to effect a change in some term of that agreement, can the plaintiffs claim that something more than their continuance in the employment was needed to make the notice effective. This claim will be dealt with in the final section of this brief.

It has been pointed out above that a second limitation upon the right of an employer to introduce a change in conditions of employment by notice to the employes is that the new terms and conditions established by the notice must not be contrary to any law. The argument is thus brought around again to the basic question in the case at bar, namely, whether the method of wage payment introduced by the notice of the Accounting and Guarantee Plan complies with the requirements of Section 6 (a) of the Fair Labor Standards Act.

D. The Defendant, by Permitting the Plaintiffs as its Employes to Retain as their Own, Sums over Which the Employer had a Legal Right of Disposition and Control, and by Making up to the Plaintiffs any Deficit Between Such Sums and the Minimum Statutory Wage, Has "Paid" Them in Accordance with the Requirements of Section 6 (a) of the Fair Labor Standards Act, and Such Payment Fully Complies with the Requirements of that Section as Reasonably and Properly Interpreted in the Light of the Policy and Intent of the Congress.

Granting that there were contracts of employment between defendant and plaintiffs providing that the

defendant should pay, and the plaintiffs receive, wages in the form and amounts provided by the Accounting and Guarantee Plan, such a contract would of course not be binding on the plaintiffs if its effect were to require plaintiffs to receive less wages from the defendant than they have a statutory right to receive under Section 6 (a) of the Fair Labor Standards Act.

On the other hand, if the method of wage payment followed under the Accounting and Guarantee Plan had the effect of bringing about the actual payment by the defendant to the plaintiffs of the full amount of the statutory wage prescribed by that section, then plaintiffs have no cause of action in this suit brought under Section 16 (b) of the Act, whether the Accounting and Guarantee Plan was incorporated in their contracts of employment or not; for the cause of action on which they are here suing is not a claim under a contract of employment, but simply a claim that they have not received from the defendant the full amount of the statutory wage. They did their work and were paid for it in a certain manner. If that method of payment gave them all that they were entitled to under the statute, they have no cause of action under Section 16 (b), whether they accepted the Accounting and Guarantee Plan or not.

The central question in this case is, therefore, whether or not it was lawful for the defendant as employer of the plaintiff red caps to apply on the wages due under Section 6 (a) from the defendant to the plaintiffs the sums collected by the plaintiffs

from the traveling public for services performed by them as defendant's employes and in the course of such employment.

In approaching this question it is not helpful to use the route of juggling abstract verbal definitions of "tips" and "wages," and asking the question "whether tips are or are not wages." The question is not whether "tips" are wages, but whether the method by which the plaintiffs were compensated by the defendant complies with the Fair Labor Standards Act. There is no question that the plaintiffs were in fact compensated for their work in amounts equal to or in excess of the statutory wage. The only question is whether they were compensated by the defendant as required by the provision of the Act that "every employer shall pay to each of his employes * * * wages" at the specified rates. Were the plaintiffs actually paid wages at the specified rates by their employer, the defendant, or not?

1. It is clear in the first place that the plaintiffs were not paid by the direct manual delivery by the defendant to them of money from its own treasury in amounts equal to the statutory wage. The first question which arises is accordingly whether the Act in using the words "pay wages" necessarily requires the direct delivery of money in the specified amount by the employer to the employe?

2. A second question,—which is but an alternative method of restating the first,—is whether or not an

employer may lawfully discharge his statutory obligation to pay wages by causing or permitting the employe to collect and retain as his own, money which is collected for the employer's account or over which the employer has a legal right of disposition and control, instead of requiring the employe to hand over such money to the employer so that the latter may then use the same to pay wages to the employe by direct manual delivery of the money.

3. Finally, the answer to the two foregoing questions is obviously to be found in an interpretation of the statutory words in accordance with, and in the light of, the purpose and intent of the Congress. Is the Congress properly to be held to have intended by the use of those words that, where the employer has caused or permitted the employe to receive the full amount of the statutory wage by the method described in the preceding paragraph, the employer must nevertheless, in addition thereto, pay to the employe, by direct delivery of money from its own treasury, a further amount equal to the full statutory wage?

For the purpose of this argument the first and second of the foregoing questions will be discussed together, and will be followed by the discussion of the third question as to the intent of the Congress.

1. THE WORDS IN WHICH THE STATUTORY OBLIGATION TO PAY WAGES IS EXPRESSED, WHEN GIVEN THEIR NORMAL AND ORDINARY LEGAL MEANING, DO NOT REQUIRE THE MANUAL DELIVERY OF MONEY DIRECTLY BY THE

EMPLOYER TO THE EMPLOYE IN AMOUNTS EQUAL TO THE STATUTORY WAGE RATES, SINCE ON PRINCIPLES OF COMMON LAW A DEBT, AND HENCE A WAGE, MAY BE "PAID" NOT MERELY BY THE DELIVERY OF MONEY, BUT ALSO BY THE TRANSFER TO THE CREDITOR OF CERTAIN KINDS OF CLAIMS AGAINST THIRD PERSONS, VIZ., CHECKS, IF THESE RESULT IN THE RECEIPT OF MONEY FROM SUCH THIRD PERSONS, AND A FORTIORI BY SURRENDERING OR FORGIVING TO THE CREDITOR AN OBLIGATION TO ACCOUNT FOR MONEY WHICH THE CREDITOR OWES TO THE DEBTOR.

Clearly it would be as impractical as it would be unreasonable to construe the statutory obligation imposed by the words "shall pay" so technically and artificially as to require in all cases direct manual delivery of money by the employer to the employe. Such a construction, for example, would outlaw payment of wages by checks, which is simply a transfer by the employer to the employe of a portion of the employer's claim against a third party, the bank. That method of payment will of course ultimately result in the employe's receiving money from the third party, but is not itself a payment of money. It is only the transfer of a claim which the employe can convert into money.

If an employer may thus make a valid payment of the wages due his employe under the Act by transferring to the employe a claim against a third party, it follows *a fortiori* that the employer may with equal validity make payment under the Act by surrendering

and cancelling a proper claim for sums due him from the employe to whom the wages are to be paid. This is no more than is allowed by the law when a debtor who is sued on his obligation is permitted to set off against it a valid claim which he has for money due from his creditor.

The right of an employer to set off against his employe's wages a valid claim which he has for money owed him by the employe has been recognized in the cases. For example, an agent who is compensated by wages from his employer cannot retain for himself commissions received from persons with whom he deals in the course of his employment, and his employer is entitled to deduct from his wages any such commission retained by the employe: *Kinney* v. *Mahoning Mills*, 13 Pa. Superior Ct. 573 (1900). So also, the employer may set off against his employe's wages the amount of loans advanced to the employe and the amount of bills owed to third persons by the employe and paid for him by the employer: *Shadoan* v. *Langdon*, 195 Ky. 495, 242 S. W. 841 (1922); *Princeton Coal Co.* v. *Borth*, 191 Ind. 615, 133 N. E. 386 (1921) (rehearing denied, 191 Ind. 615, 134 N. E. 275 (1922)).*

* The Wage and Hour Division itself has recognized as the equivalent of the payment of wages the deduction, when authorized by the employe, of amounts paid or to be paid to the employe's insurance company for insurance premiums or to a store from which he has bought goods, provided the employer does not receive any profit or benefit from the transaction which would reduce the net amount received by the employe, in cash and in payment of his indebtedness combined, to an amount less than the minimum wage (Wage and Hour Division, General Counsel's Interpretative Bulletin No. 3, Esp. Pars. 12, 13, 14, 17, issued Oct. 21, 1938, and revised August and Octo-

It is of course but an elementary principle of common-sense justice to permit an employer to deduct from the debt, viz., wages, which he owes his employe any debt which the employe owes him, and to consider payment of the balance as a full discharge of the employer's obligation to pay the employe's wages; and that principle is recognized by the cases cited.

These cases involve no conflict whatever with the principle, frequently embodied in statutes, that an employer may not require an employe to accept his payment of wages in any other medium than money (see *Princeton Coal Co.* v. *Dorth*, 191 Ind. 615, 134 N. E. 275 (1922)). The latter principle, which, for example, is applied in the statutes forbidding the payment of wages in "truck" or "store-orders," is designed to prevent the employer, under the guise of paying "money's worth," from discharging his claim to the employe by something worth less than the amount of money which the employe is entitled to receive. However, if in fact the payment in a substitute for money is so safe-guarded as to insure its equivalence to the full money wage, the right of the employer to pay by means of such a substitute is generally recognized, and is in fact recognized by Section 3 (m) of the Fair Labor Standards Act (quoted above at p. 4), which defines wages so as to include the

ber, 1940) 2 C. C. H. Labor Law Service, Par. 32103; 52 Wage and Hour Reporter 570, 573. For example, the interpretative bulletin of the General Counsel of the Wage and Hour Division states:

> "In such case payment to the third person for the benefit and credit of the employe will be considered equivalent, for purposes of the Act, to payment to the employe."

reasonable cost to the employer of furnishing the employe with "board, lodging, or other facilities," and thereby in effect permits such cost to be set off against wages. Even that provision, however, need not be invoked in the situation presented in the instant case, since what the employe here received was not a substitute for money but the money itself, which he collected on behalf of the employer.

The Accounting and Guarantee Plan, as explained in the foregoing sections of this brief, is nothing more nor less than an instance of the employer setting off against the wages due to the employe the amount of money collected by the employe as compensation in the course of his employment, which money the employe would ordinarily be required to pay over to his employer but which the employer allows him to keep as payment or part-payment of his wages. This is payment by the employer in as real and direct a sense as when another type of debtor is permitted to discharge his obligation to his creditor by setting off what the creditor owes him.

This is clearly recognized by the Circuit Court of Appeals in the instant case, as appears from the following language of its opinion (118 F. (2d), at p. 327):

> "The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds. But it does not prohibit the employee being given the duty of collecting the employer's money, and the privilege of paying himself out of it, subject to ac-

counting, provided the employer stands ready to promptly pay any balance due the employee. For example, an interstate trolley company might authorize its conductor to collect cash fares, and account for them thus. The fares would belong to the employer, but the conductor might take and spend them to the extent of his wages, because the employer had authorized it. Otherwise he could not. We perceive no breach of the minimum wage provisions of the law in such an accounting arrangement fairly and promptly carried out. * * * *We do not think the Act condemns ipso facto all payment of wages by accounting, or requires us to say that although the employee got all he ought to have had of his employer's money, the employer must pay again because the employee was allowed to keep what was in his possession instead of paying it to the employer and receiving it back again*" (R. 219-220). (Emphasis supplied)

The point was also well stated by Judge Waller in his opinion in the District Court in the instant case. After pointing out that "wages" as defined in the Act includes the "reasonable cost" of furnishing "board, lodging, or other facilities," Judge Waller stated (35 F. Supp., at p. 270):

"The reasonable cost of board, lodging, and the like, may be determined by the Administrator; that is to say, that the Administrator has the right, probably the duty, to determine whether or not the cost of the things charged to the employee as wages is reasonable. *The Act does not*

prohibit the compensation of a wage earner with something other than money paid out of the pocket of an employer, but whatever is charged as a wage must be reasonable. If, however, the 'other facilities' happen to be money, there is no 'reasonable cost' to be determined by the Administrator. For example, if Jones pays his truck driver 15 cents an hour and permits him to use his truck to haul for other people, whereby the truck driver makes an additional 15 cents an hour, there would be nothing for the Administrator to determine as to the reasonable cost of their arrangement. The main point is, does the truck driver receive the wages required by the Act, and if he received a portion from Jones as fixed wages and the balance from instrumentalities furnished by Jones, under circumstances that the matter of reasonable cost was not involved, it would seem there was nothing for the Administrator to determine. *It would also seem that the letter of the Act itself contemplates the use of facilities in the matter of payment of wages.* * * * (R. 199-200).

"However, if we concede that they were employees and within the Act, we would still find that, in cash paid directly and through the facilities furnished by the employer, plaintiffs have been paid, in the aggregate, considerably in excess of the minimum wages required by said Act. *It would seem immaterial whether the employee was paid by the employer directly or whether he was paid through an instrumentality or facility set up for his use and benefit by the employer.*" (R. 201). (Emphasis supplied)

And again (p. 271):

> "The Court believes that the wording of the Act in defining 'wages' provides that things other than the direct payment of money can be used in the payment of wages. *The plaintiffs here were paid in money, but in an indirect way—through facilities afforded the plaintiffs by defendant.* * * *. They were compensated in money which the defendant had the legal right to collect and to keep if it rendered the services through its employees as contended. *There can be no substantial difference between compensation for services rendered and wages for services rendered.*" (R. 202). (Emphasis supplied)

Defendant submits that the arguments advanced in previous sections of this brief amply demonstrate that the amounts received by red caps from the defendant's patrons, for services performed by the red caps as defendant's employes and in the course of their employment, were sums which the defendant from the time that the employer-employe relationship originated had the legal right to require the red caps to turn over or account for to it. It asserted that right by the notice of October 24, 1938, which the plaintiffs accepted by continuing to work thereunder and by accepting the benefits of the guarantee proffered by the notice. Thereafter it was not open to question that: (1) the sums received by the red caps from defendant's patrons as so-called "tips" were sums which the defendant claimed and the red caps recognized as due from them to the defendant, and

(2) the defendant permitted the red caps to retain such sums as their own property in payment *pro tanto* of the red caps' claim against the defendant for wages. Such permission to the red caps to retain, as their own, sums which belonged to the defendant constituted payment by the defendant in the ordinary legal sense of the term and was, therefore, payment within the meaning of the statutory obligation to "pay," imposed by Section 6 (a) of the Fair Labor Standards Act.

2. IT WAS THE INTENT AND POLICY OF THE CONGRESS, IN ENACTING THE MINIMUM WAGE PROVISIONS OF THE FAIR LABOR STANDARDS ACT, TO REQUIRE THE EMPLOYER TO PROVIDE THE EMPLOYE WITH MEANS SUFFICIENT TO DEFRAY THE COST OF A MINIMUM STANDARD OF DECENT LIVING; AND THE MINIMUM WAGE PROVISIONS OF THE ACT SHOULD BE CONSTRUED ACCORDING TO THAT INTENT, IN PREFERENCE TO A CONSTRUCTION WHICH WOULD DISREGARD THE INTENT OF THE CONGRESS AND WOULD REQUIRE THE EMPLOYER TO PAY THE EMPLOYE AT A SUBSTANTIALLY HIGHER RATE THAN THAT FIXED BY THE ACT.

It is thus clear, from the considerations discussed in the immediately preceding section, that there is nothing in the language of the minimum wage provisions of the Fair Labor Standards Act which prohibits the payment of wages by the employer, as required therein, in a manner such as that provided in the Accounting and Guarantee Plan. But it is not enough in a statute of this kind to look only at its words. Consideration of the intent and policy of

the Congress in enacting the statute shows even more clearly that the method of payment provided by the Accounting and Guarantee Plan constituted full compliance with the requirements of the Act.

It is of course axiomatic that a proper and reasonable construction of a statute requires that the statutory language shall be read in the light of the intent and purpose of the Congress in enacting the statute. This principle has been stated by this Court in a classic passage of its opinion in *Hawaii* v. *Mankichi*, 190 U. S. 197 (1903), at page 212, in the following language:

> "But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske*, 23 Wall. 374, 380: 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court), in *People* v. *Utica Ins. Co.*, 15 John. 358, 381: '*A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the*

*letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers.'**

"Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States* v. *Kirby*, 7 Wall. 482, in which an act of Congress, providing for the punishing of any person who 'shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier,' was held not to apply to a state officer who had a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. 'All laws,' said the court, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, 'for he is not to be hanged because he would not stay to be burned.' Similar language to that in *Kirby's* case was used in *Carlisle* v. *United States*, 16 Wall. 147, 153."

* Emphasis supplied. This point was urged upon the Supreme Court of New York in *People* v. *Utica Ins. Co.*, by Mr. Martin Van Buren, who was at that time Attorney General of the State of New York.

The principle was again well stated by this Court, through Mr. Justice Reed, in the recent case of *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 542-43, 60 S. Ct. 1059, 1063-64 (1940), as follows:

> "In the interpretation of statutes, the function of the courts is easily stated. *It is to construe the language so as to give effect to the intent of Congress.* There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.* Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (Emphasis supplied)

To the same effect are *Ozawa* v. *United States*, 260 U. S. 178, 43 S. Ct. 65 (1922), and *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 47 S. Ct. 616 (1927).

It follows from the principles thus established by these and many other decisions that the intent and policy of the statute must be considered in order to arrive at its proper interpretation. What was the intent and policy of the Congress in enacting the minimum wage provisions of the Fair Labor Standards Act?

(a) *The history of minimum wage legislation shows that the purpose of such legislation has always been to insure to the employe the means sufficient to provide a minimum standard of decent living.*

Extensive demonstration is not needed to show that the purpose of minimum wage legislation has always been to insure to workers the means sufficient to enable them to defray the cost of a minimum standard of decent living. No more persuasive reference in support of that proposition can be made than to the brief prepared by Mr. Justice Frankfurter, when at the bar, and filed with this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394 (1922). The arguments therein presented in support of the District of Columbia Minimum Wage Law, and the material with respect to the whole minimum wage movement and minimum wage legislation in the various states of this country and in other countries, which is collected and analyzed in that brief, indicate very clearly that the securing of a minimum standard of decent living has been the objective of all such legislation.

Thus, it is said in that brief, at page xxviii, in discussing the background of the District of Columbia Minimum Wage Law:

> "It thus appears that Congress, in its responsibility for the District, was confronted with the evils flowing from a deficit between the minimum cost necessary for women workers to live without detriment 'to their health and morals,' and the wages which were actually being paid *below this minimum* to a considerable percentage of the of the women workers of the District."

The brief then quotes a portion of the testimony of Dr. Woodward, Health Commissioner of the District, which includes the following language (pp. xxviii-xxix):

> "It stands to reason, therefore, that inadequacy of wage means either of two things. On the one hand it may mean inadequacy of shelter, inadequacy of clothing, inadequacy of food, inadequacy of recreational facilities on the one hand it may mean any one of those conditions, or it may mean all—with resultant impoverishment of health—or, on the other hand, it means that from some source or other the wage must be supplemented, with possible resort to wrongdoing to accomplish that end."

The brief goes on to state, at page xxx:

> "There is no dispute that Congress was honest, was acting in good faith, after mature deliberation, in avowing the purposes which it did in the enactment of the Minimum Wage Law, to wit:

> "'to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living.'
>
> "In a word, the ends towards which this legislation was directed were, within the area of Congressional power, the ends of the very life of the Nation, namely the health and civilized maintenance of this generation, and a healthy and civilized continuance of generations to follow."

In opening its discussion of minimum wage legislation generally, that brief states as follows, on page 1:

> "Minimum wage legislation has raised the wages of the workers at the bottom of the wage scale. The level attained varies from state to state according to the determination of each wage board or commission upon the facts and after hearing as to *the necessary cost of living sufficient to maintain the worker in health.*" (Emphasis supplied)

And, in discussing the need for minimum wage legislation for women in particular, the brief points out, at p. 687, that:

> "In certain industries and occupations the level of wages is below the cost of living."
>
> "Recent authoritative statistics show that in certain industries, the average wage is too low to maintain the workers in health judged even by the most meagre standard."

And again, at p. 915, under the heading, "The Minimum Standard of Living."

> "The conception of a 'living wage' is growing from indefiniteness to a scientific standard that can be defined and measured as to the cost of maintenance of a healthy worker."

Nothing in any of the arguments or material set forth in that brief, and nothing in the history of minimum wage legislation generally, indicates that the purpose of such legislation has ever been other than to insure a minimum standard of decent living for workers.

(b) *The legislative history of the Fair Labor Standards Act, and the face of the Act itself, show that its only purpose was to insure to workers the means sufficient to meet the cost of a minimum standard of decent living, and not to impose additional burdens on the employer.*

Examination of the legislative history* of the Fair Labor Standards Act reveals beyond question that the evil which the Act was designed to eliminate was the existence of wages too low to provide a decent standard of living, and that the purpose of the Act and the intent of the Congress in enacting it was, as declared in the Act itself, to secure to workers the means of obtaining such a standard of living. Nothing in its legislative history, any more than in the Act itself, indicates that it was in any way designed

* For the complete legislative history of the Act, see Douglas and Hackman, "The Fair Labor Standards Act," 53 Pol. Sci. Q. 491.

for the purpose of imposing additional burdens upon employers, requiring the payment of compensation from an employer to his employe in any particular form or manner, or regulating wages or terms of employment generally, except insofar as such regulation was necessary to insure that the employer would provide the employe with what Congress regarded as the cost of a minimum standard of living.

The Fair Labor Standards Act was the legislative culmination of recommendations contained in President Roosevelt's message to Congress of May 24, 1937, in which the President, among other things, referred to the plight of the "ill-nourished, ill-housed and ill-clad" third of our population. Shortly thereafter, Senator (now Mr. Justice) Black, and Representative Connery, simultaneously introduced bills in the Senate and in the House of Representatives which were designed to attain the objectives outlined by the President. Joint public hearings were held before the Senate Committee on Education and Labor, of which Senator Black was Chairman, and the House Committee on Labor, of which Representative Connery was Chairman. The latter died not long afterwards, and was succeeded as Chairman of that Committee by Representative Norton.

On July 6, 1937, Senator Black reported to the Senate for his Committee, favoring passage of the proposed bill with certain amendments, and on August 2 it was passed by the Senate with further amendments. Excerpts from the report thus presented to the Senate (Senate Report No. 884, 75th Congress,

First Session) indicate clearly the purpose of the bill and the intent of the Senate in passing it:

> "The Committee believes that a start should be made at the present session of the Congress *to protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life* * * * and from too long hours of work injurious to health. * * *" (Emphasis supplied) (Page 4, S. R. 884).
>
> "Section 4 (b) authorizes the Board by order to declare from time to time for such occupations as are brought within the operation of the act minimum wages which shall be as nearly adequate as is economically feasible without curtailing opportunity for employment to *maintain a minimum standing of living necessary for health, efficiency, and general well-being.*" (Emphasis supplied). (Page 6, S. R. 384).

Thereafter on July 27, 1937, Senator Black made the following statement on the floor of the Senate during debate on the bill (81 Congressional Record 7651, 1937):

> "The bill is intended to prevent, so far as wages are concerned, the payment of *wages which are below a necessary subsistence level.* The bill is written upon the principle that the *Congress should not attempt to make itself a wage-fixing body. We believe that wages should be fixed by agreement between employer and employee except that the bill has as its objective withdrawing from competitive conditions the wage level necessary for a person to live on wherever he may be.*" (Emphasis supplied)

This bill (S. 2475) was then referred to the House Committee on Labor, which amended it in certain minor respects, and Representative Norton, for the Committee, in reporting it favorably to the House on August 6, 1937 (House Report No. 1452, 75th Congress, First Session), indicated that the House Committee had exactly the same purpose in mind in recommending the bill as did the Senate Committee:

> "A full third of the American people have not the purchasing power to maintain what we should like to regard as *a decent standard of American life.* Too many of our workers are working excessively long hours for excessively low pay." Emphasis supplied) (Page 8, H. R. 1452).
>
> "The Board is permitted to determine minimum wages and maximum hours *only in those industries where sub-standard labor conditions exist.*" (Emphasis supplied) (Page 10, H. R. 1452).

The bill as thus recommended to the House provided for a Labor Standards Board, with power to fix minimum wages and limit maximum hours for industries covered by the bill, in accordance with the purpose of the Act. The bill in this form did not pass the House, but was resubmitted to the House Committee for further consideration. That Committee reported again on April 28, 1938 (House Report No. 2182, 75th Congress, Third Session), recommending passage of a revised bill, wherein the proposed Labor Standards Board was eliminated and instead a provision was made for a flat 25¢-an-hour

rate for the first year, to be increased 5¢ an hour per year until 40¢ an hour was reached. These flat minimum wage amounts reflected the Committee's own conception of the amount necessary to meet the cost of a minimum standard of decent living. That the purpose of the Act was to insure such a standard of living for workers was again manifested by the comments in the House Committee's new report:

> "*The Federal government cannot and should not attempt to regulate the wages of all wage earners throughout the United States.* But the Federal government cannot by its inaction permit the channels of commerce to be used to set this spiral of deflation in motion. * * * It cannot in silence *see the channels of commerce used to spread suffering and destitution.* * * * Unless the wages paid by private employers are sufficient *to maintain the bare cost of living*, such demands [for relief] will necessarily continue. * * * It [the Committee amendment] establishes a floor for wages, and a ceiling for hours, and abolishes child labor." (Emphasis supplied)
>
> (Page 6, H. R. 2182.)

Thereafter, the House and Senate Committees in joint conference considered the bill, as thus amended by the House Committee and passed by the House, and, after further minor amendments, made a report to the Congress recommending that the bill be passed in the form in which it was passed on June 25, 1938. That final report (House Report No. 2738, 75th Congress, Third Session) reiterated the policy of the Act, which, it stated, was to correct and eliminate:

"labor conditions detrimental to the *maintenance of the minimum standard of living necessary for health, efficiency and general well-being.*" (Emphasis supplied)

(Page 28, H. R. 2738.)

In the face of this legislative history, there can be no doubt that the purpose which was uniformly in the minds of both Houses of Congress and their Committees in considering and enacting the Fair Labor Standards Act was to insure for workers a minimum standard of decent living.*

Finally, the best evidence of the purpose of the Fair Labor Standards Act and the intent of Congress in enacting it is to be found on the face of the Act itself. The "policy" section (Sec. 2) provides as follows:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of *the minimum standard of living necessary for health, efficiency, and general well-being of workers* (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and

* The propriety of referring to legislative matter of the character discussed above in order to determine the purpose of a statute is of course well established: *United States* v. *City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749 (1940); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) *It is hereby declared to be the policy of this chapter,* through the exercise by Congress of its power to regulate commerce among the several States, *to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries* without substantially curtailing employment or earning power." (Emphasis supplied)

No better discussion of the purpose of the Act and the intent of the Congress in enacting it can be found than that which appears in a note entitled "Fair Labor Standards Act—Tips as Wages," commenting on the *Pickett* case, in 40 Columbia Law Review 1262 (November, 1940), as follows (pp. 1262-64):

"The general purpose of the legislation is, however, clearly indicated in many ways. Throughout the hearings, reports, and debates there are repeated references to 'industrial workers' in saw mills, sweatshops and factories who are receiving approximately $4 to $10 a week, *who cannot buy the 'bare necessities of life,' who are working under 'substandard labor conditions,' and whose wages are below the 'necessary subsistence level.'* The original Senate and House bills as reported to the first session of the 75th Congress in 1937 did not provide for a definite twenty-five cent or thirty cent minimum hourly wage, but left to the discretion of a Labor Standards Board the task of declaring for each occupation a minimum wage which would be as nearly adequate as was economically feasible and which would maintain a 'mini-

mum standard of living necessary for health, efficiency and general well-being.' *Evidently the primary aim of the legislators was to see that the reward for labor would at least be sufficient to provide a decent living.* * * *

"*Hence it may be contended with some justification that the Act was designed not to insure the minimum wage in addition to other income received for the same work, but to insure a minimum standard of living to the employee.* The declaration of policy in the statute itself would seem to bear out this thought. It is also worthy of note that there was no administrative practice established under the Act which could have impelled the court toward the contrary position." (Emphasis supplied)

(c) *Construction of the minimum wage provisions of the Fair Labor Standards Act in accordance with its purpose makes it clear that payment to the plaintiffs under the Accounting and Guarantee Plan was in compliance with the Act; and such a construction is to be preferred to the plaintiffs' construction, which would disregard the purpose of the Act and would result in the payment of more than the minimum wage required by the Act.*

Is the Accounting and Guarantee Plan in accordance with the purpose and intent of the Fair Labor Standards Act, as thus made plain by the legislative history of the Act and by the face of the Act itself? It seems obvious that the answer must be in the affirmative, since under that plan the employe was certain to receive, in money, at least the full amount which

the Congress fixed in the Act as the amount needed to meet the cost of a minimum standard of decent living. The only possible question is whether the compensation received by the red caps under the Accounting and Guarantee Plan constituted payment by the employer to the employe, within the meaning of the literal terms of the Act.

It has already been pointed out above (pp. 100-108) that the method of payment provided by the Accounting and Guarantee Plan constituted legally a payment by the employer to the employe. There is nothing in the Act which prohibits an employer from paying his employe in part or in whole by permitting the employe to retain money collected in the employer's behalf; indeed, there is nothing in the Act which requires or prohibits payment by the employer in any particular manner or by any specified method, and the contention that the method provided by the Accounting and Guarantee Plan is not a literal compliance with the Act is therefore wholly without foundation. But even if it were established that the method of payment provided by this Plan did not literally comply with the letter of the Act, the Plan would, since it fulfills the purpose of the Act, fall squarely within the proposition so well stated by Mr. Justice Thompson in *People* v. *Utica Ins. Co., supra,* and adopted by this court in *Hawaii* v. *Mankichi, supra:*

> "A thing which is within the intention of the makers of a statute is as much within the statute

as if it were within the letter" (190 U. S. at p. 212).

Surely, it would be a monstrous thing to impose as drastic a penalty as that provided in this Act (in the form of double the wages due plus costs and attorney's fees) for conduct which amounts to a full compliance with the purpose and intent of the Act. It is unthinkable that the Congress would have provided a severe penalty of this character unless it had been aimed at violations which would tend to thwart the purpose and intent of the Act. The existence of the penalty provision is consistent only with the supposition that it was the intent of Congress to accomplish the ultimate objective of the Act, not to require that this ultimate objective be achieved by some particular limited means determined by a narrow and technical construction of the letter of the Act.

In contrast to the construction of the Act urged by the defendant, which would give full effect to the intent and purpose of the Congress and would recognize the Accounting and Guarantee Plan as a lawful compliance with the Act, the construction urged by the plaintiffs would in effect disregard the purpose of the Act, since it would result in requiring the payment to the employe of large sums in excess of the amount deliberately fixed by the Congress in the Act as that which in its opinion is necessary to defray the cost of a minimum standard of living. The amount as thus fixed by the Congress for the period

covered by this action was 25 cents per hour during the first twelve months and 30 cents per hour during the final nine months, or a weighted average of 27 cents per hour for the whole period. As already pointed out, if the plaintiffs' construction of the Act is sound, the result would be that during the first twelve months covered by this suit they would have received, at the expense of their employer, compensation at the rate of 46.6 cents per hour, and, during the last nine months of the period, compensation at the rate of 51.6 cents per hour—nearly twice as much as the amount which Congress regarded as necessary to fulfill the purpose of the Act (see pp. 20-21 above). If, in addition, the amounts which plaintiffs seek to recover in this case are taken into account, it appears that the construction of the Act for which they contend would have the result of giving them nearly three times the compensation fixed as the minimum wage in the Act—even though there has been no intent on defendant's part to make the plaintiffs work for less compensation than the amount provided in the Act.

Thus, according to their interpretation, although the plaintiffs have already received $35,293.12,—the amount reported by them as the compensation paid by defendant's patrons for services performed by the plaintiffs as defendant's employes,—and, in addition, the amounts received directly by plaintiffs from defendant, viz., $8,321.33,—which two figures, together totaling $43,614.45, amount to $3,019.76 more than

the amount of the minimum wage prescribed by Section 6(a) of the Act (R. 13),—nevertheless, the plaintiffs would be entitled to recover again, as if for an unpaid minimum wage, $32,273.36. In addition, it must be borne in mind that under Section 16 (b) of the Fair Labor Standards Act, if the plaintiffs are permitted to recover this $32,273.36, they are at the same time entitled to recover "an additional equal amount as liquidated damages," or, in other words, another $32,273.36. This means that, if they are entitled to recover, plaintiffs will have received in all $108,161.17,—nearly three times the amount of the minimum wage provided by the Act, which was $40,594.69.

If the literal meaning of the Act is such as to produce that result, then it seems clear that the result is an "absurd or futile" one, within the principle stated in *United States* v. *American Trucking Ass'ns, supra* (see p. 111 above), and that it should, therefore, impel the court to "look beyond the words to the purpose of the Act." And if the Act is interpreted according to its purpose, then it is plain that the plaintiffs' construction must be rejected; for their construction would effectuate, not the purpose of insuring the means of providing a minimum standard of living, so clearly indicated by the Act itself and its legislative history, but rather a purpose to burden the employer with an obligation to pay out large sums of money for the benefit of the employes. As stated in the note in 40 Columbia Law Review 1262,

in commenting on the fact that the Administrator of the Wage and Hour Division had expressed an opinion that tips are not wages, but had "left the solution of the problem to the courts" and had made no ruling on the question (p. 1264):

> "In any event, it is rather difficult to agree with his theory that the statute was intended to saddle a debt on the employer rather than to guarantee a decent living to the employee."

The unfairness and incongruity which would result from the plaintiff's construction of the Act was well recognized and forcefully pointed out by Judge Waller in his opinion below (35 F. Supp., at p. 271):

> "*The intent of an Act is the essence thereof, and the intent thereof should be given effect as against the mere words of an act when the mere words, construed alone, would produce legislative or judicial brigandage.* * *
>
> "Congress intended to secure to employees at least a minimum compensation for the hours of service performed. *It never intended that Section 6 of the Act should do more than that.* In the present case the plaintiffs, as a group, received out of their relationship, or employment, some $3,000 in excess of the minimum wages required by law. They here seek to be paid again all sums which they have received out of their relationship or employment, plus an equal amount as liquidated damages, plus attorney's fee. *I subscribe wholeheartedly to the real purpose of the Act as I conceive it, but I cannot ascribe to Congress the superlative folly of intending that an employee, under the circumstances of this case,*

wherein no element of willfulness is involved, should recover the minimum wage thrice multiplied." (Emphasis supplied)

3. THE FACT THAT DEFENDANT'S CONSTRUCTION OF THE FAIR LABOR STANDARDS ACT IS IN ACCORD WITH THE PURPOSE OF THAT ACT IS CONFIRMED BY THE CONSTRUCTION GIVEN TO OTHER SOCIAL LEGISLATION, WHEREBY TIPS HAVE BEEN REGARDED AS EQUIVALENT TO WAGES PAID TO THE EMPLOYE BY THE EMPLOYER.

The Fair Labor Standards Act is but one of a series of so-called "social legislation" statutes which have been enacted in recent years both by Congress and by State legislatures, and which have the same general objective of assuring the existence of certain conditions among those employed in industry. In numerous instances, other statutes in this series have been construed by courts and administrative bodies in such a manner that tips are treated as the equivalent of the salary or wages which the statute contemplates as being paid by the employer to the employe. Construction of those statutes in such manner provides persuasive confirmation of the construction of the Fair Labor Standards Act for which the defendant here contends, viz., that the application of tips on the wages due the employe, as provided in the Accounting and Guarantee Plan, is fully in accord with the purpose and intent of the Act and is therefore in compliance with the Act.

(a) *Workmen's Compensation Acts.*

The object of Workmen's Compensation statutes is to assure an income to employes when they are in-

jured in accidents arising out of and in the course of their employment. The incomes thus to be assured to the employes are based on certain percentages of the wages or salaries formerly paid to the employes for the work in which they were engaged.

Thus, in *Sloat* v. *Rochester Taxicab Co., supra,* the court decided that tips should be considered in determining the basis on which the compensation payments made to an injured employe should be calculated under the New York Workmen's Compensation Law. In this regard, the pertinent part of the New York statute provided that the amount of the compensation should be based on (163 N. Y. Supp. at p. 905):

> "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage *received from the employer.*" (Emphasis supplied)

The court pointed out (pp. 905-6 of 163 N. Y. Supp.) that the "*employe could not have received the tips if the employer had not put him in the way of getting them,*" and so concluded that tips were an advantage received from the employer.* To the same

*It is true that the New York statute contained the word "advantage," a word not used in the Fair Labor Standards Act. However, this is of no significance, in the face of the court's holding that tips constituted compensation "received from the employer." The court there was concerned, not with construing the word "wages," which did not appear in the controlling section of the New York statute, but with the question whether tips were compensation "received from the employer," and should therefore be included in the basis for calculating the payments provided by the statute. The court's holding on this point is an exact precedent for the defendant's contention herein that the tips received by the red caps under the Accounting and Guarantee Plan were "received from the employer" and therefore paid to them by the employer.

effect are the decisions under the same statute in *Bryant* v. *Pullman Co., supra,* and in *Kadison* v. *Gottlieb,* 226 App. Div. 700, 233 N. Y. Supp. 485, (1929).*

Another case which clearly supports the defendant's construction in this respect is *Powers' Case,* 275 Mass. 515, 176 N. E. 621 (1931), a case under the Massachusetts Compensation Act, which made "wages" the basis of compensation. There the employe, a waitress in a restaurant, received from her employer a fixed stipend and was also allowed to retain for herself tips given her by the patrons of the restaurant. In holding that these tips were the equivalent of wages under the Act, the court said (176 N. E., at p. 622):

> *"It seems plain that from the standpoint of the employee the tips in the case at bar were in the nature of wages or earnings.* * * * The stipend paid to her by the employer was the smaller part of the actual income received by her as a consequence of her labor for him. The situation was fully understood and freely assented to by the employer. * * * The tips were in the nature of part payment for the service received by the patrons at the place of business of the employer. *Payments made to his employee by his patrons with the approval of the employer, under the protection of his place of business and for his benefit,*

* Both the *Bryant* and the *Sloat* cases were cited by the Brotherhood of Red Caps in its brief filed with the Interstate Commerce Commission in the *Ex Parte 72* proceedings, in support of the position at that time taken by the red caps that tips were wages. In that case, the red caps quoted liberally from the *Sloat* case in arguing that they were employes of the carriers because they received wages from them when they were permitted by the carriers to retain tips. Having achieved the desired result in that case, they now reverse their position and reject the argument on which they therein relied.

bear a close analogy to wages paid by him." (Emphasis supplied)

A like situation existed in *Gross' Case,* 132 Me. 59, 166 Atl. 55 (1933). The Maine Compensation Act provided for calculation of the compensation on the basis of "wages, earnings or salary," and further provided that, "in determining the compensation to be paid, benefits received from any other source than the employer shall not be taken into consideration." The Maine Court "adopted * * * with full approval" the decision of the Massachusetts court in *Powers' Case, supra,* and held that tips received by the waitress from patrons of the restaurant did not constitute "benefits received from any other source than the employer," and were therefore properly included in the "wages, earnings or salary" on which the compensation was based. In fact, the court expressly treated the employe's tips as wages in stating that "patrons help him (the employer) pay the wages which is fairly due from him to his employe."

Further support for the defendant's position is found in the Texas courts, which have decided that, under the Texas Workmen's Compensation Act, which defines wages as remuneration "which the employe receives from the employer," tips are included therein: *Lloyd's Casualty Co.* v. *Meredith,* 63 S. W. (2d) 1051 (Tex. Civ. App., 1933); *Federal Underwriters Exchange* v. *Husted,* 94 S. W. (2d) 540 (Tex. Civ. App., 1936).*

*The Texas statute provided that compensation should be based on wages and "other advantages received by the injured employe as part of his remuneration and which can be estimated in money." However, the Texas courts held tips to be "wages" under the statute and not "advantages," which is of course reasonable, since tips are in themselves money and not something which needs to be "estimated in money."

(b) *Federal Social Security Act.*

The Federal Social Security Act provides for the assessment of taxes on the basis of "wages" paid or payable to the employe by the employer. Thus, Section 1004 of Title VIII of the Act (42 U. S. C. 1004) provides:

> "In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the *wages* (as defined in Section 1011 of this chapter) *paid by him* after December 31, 1936, with respect to employment (as defined in Section 1011 of this chapter) after such dates." (Emphasis supplied)

Section 1101 of Title IX of the Act provides (42 U. S. C. 1101):

> "On and after January 1, 1936, every employer (as defined in Section 1107 of this chapter) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 1107 of this chapter) *payable by him* (regardless of the time of payment) with respect to employment (as defined in Section 1107 of this chapter) during such calendar year." (Emphasis supplied)

It is clear from these provisions that the tax which the employer must pay is based on the wages which are paid or payable by him to his employe. Wages under the Act are defined as follows (42 U. S. C. 1011):

"The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."

In construing these provisions of the Security Act, the Bureau of Internal Revenue of the Treasury Department has determined that tips reported to the employer for the purpose of enabling the employer to compute the sum due to the employe, under a plan providing for guaranteed income to the employe, constitute wages paid by the employer or wages payable by the employer, within the meaning of the Act. This ruling was set forth in *Internal Revenue Bulletin*, C. B. 1938—1, p. 456, in which the following language appears:*

"Question 4. If a hotel or restaurant guarantees its waiters a fixed income consisting partly of remuneration paid by the restaurant and partly of tips, does such a guarantee affect the status of the tips received by the waiters?

"Answer. Inasmuch as the employer bases the remuneration of his employee on the amount of such tips, and since the employees must inform the employer of the amount of tips received in order that the latter may compute the balance due the employees, it is clear that such tips constitute 'wages' within the meaning of Titles VIII and IX of the Act."

In this ruling, the Treasury Department thus treated tips as wages "paid" or "payable" by the

* Summarized in I. C. C. H. Unemployment Insurance Service, Pars. Fed. 5204.271 (p. 2024), and 5704.015 (p. 2429).

employer, within the meaning of the Social Security Act. The facts presented in that ruling were exactly parallel to those involved in the case at bar, and the same answer should be given here as was given there.

(c) *National Labor Relations Act.*

The National Labor Relations Board, in ordering the reinstatement of waiters discharged for union activity, has directed in proceedings under the National Labor Relations Act that the "back pay" which must be paid by the employer should be calculated on the basis of previous average income, including tips: In re *Club Troika*, 2 N. L. R. B. 90 (1936); In re *Willard*, 2 N. L. R. B. 1094 (1937). The clear implication from these decisions is that tips were "pay" to the employe from the employer, and should therefore be included in the "back pay" which the employer must make up to the employe.

(d) *Railroad Retirement Act.*

A specific administrative ruling with respect to the Accounting and Guarantee Plan itself has been rendered by the Railroad Retirement Board, regarding compensation to be credited to red caps for purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts (45 U. S. C., Secs. 228a and 351). Although the term "compensation" is defined in the Railroad Retirement Act so as expressly to exclude tips (45 U. S. C., Sec. 228a (h)), the Retirement Board has nevertheless decided that under the Accounting and Guarantee Plan the "tips" or other

remuneration collected by red caps from railroad patrons are to be included, along with the amounts paid them directly by the railroads, as the red caps' compensation under those statutory provisions. The conclusion of the General Counsel of the Board (which became the Board's ruling) was as follows (Opinion No. 1941, R. R. 35 and U. I. 11, dated September 17, 1941):

> "It is my opinion that 'red caps' under this arrangement can be credited with 'compensation' under the Railroad Retirement Act and the Railroad Unemployment Insurance Act in an amount (but not including any amount in excess of $300 in any one month) equal to the amounts of tips or other remuneration received by them from railroad patrons which they are required to report to the railroads, plus whatever amount is necessary to make up the minimum guaranteed by the railroads. It is my further opinion that railroad 'employers' are liable for 'contributions' under the Railroad Unemployment Insurance Act under the arrangement on the same basis as compensation can be credited to their employees."*

It thus seems clear, from these decisions of the courts and of administrative bodies, that, in contending that the intent and purpose of the Congress in

* The Board's position in this respect has been summarized as follows (C. C. H. Railroad Unemployment Insurance Service, Par. 9265, pp. 7375-76):

> "Although tips are specifically excluded by the Railroad Retirement Act from consideration as creditable compensation, the general counsel held that redcaps earn remuneration in a form which is different from pure tips, which are excluded. Under special arrangement with the railroads, redcaps are guaranteed a minimum amount and are permitted to retain all gratuities subject to their being reported and credited against the minimum amount.
>
> "Whatever redcaps are paid, even though in small amounts from railroad patrons, is in return for services performed under the railroad's supervision, and therefore for services as a railroad employee."

providing for a minimum wage was not to forbid the accounting for tips received in the course of employment (when the minimum wage was guaranteed by the employer) but was only to guarantee to the employe the minimum compensation specified in the Act, the defendant is urging a view that has been generally accepted as in accord with the policy and purpose underlying social legislation of this character.

II.

THE PROVISIONS OF SECTION 2, SEVENTH, AND SECTION 6 OF THE RAILWAY LABOR ACT, AS AMENDED, DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT, IN PAYING WAGES TO THE PLAINTIFFS UNDER THE ACCOUNTING AND GUARANTEE PLAN, FAILED TO COMPLY WITH THE FAIR LABOR STANDARDS ACT.

In the Circuit Court of Appeals below, the plaintiffs argued that they had "verbal working agreements" with the defendant,—by which they apparently referred to their individual contracts of employment,—and that the notice of October 24, 1938, constituted a unilateral change in such working agreements contrary to the provisions of Section 6 of the Railway Labor Act.

Thus in their brief in the Circuit Court of Appeals the plaintiffs said:

"It has been shown above that the plaintiffs had a working agreement. Verbal though it may have been, it certainly was the agreement under which they were working, and just as effective as if it had been in writing signed by all the parties involved. The rights of the plaintiffs under their working agreement could not be taken away from them in any such high-handed manner as attempted by the publishing of the notice." p. 21 of Appellants' Brief in Circuit Court of Appeals).

Then, after referring to Section 6 of the Railway Labor Act, the plaintiffs continued:

"Certainly under this Section if this notice was intended to change or set up a new working condition or agreement, the plaintiffs as employees of the defendant, had a perfect right to disregard the same as not in any way even attempting to comply with the terms and conditions of this Section * * *" (*ibid.*, p. 22).

Plaintiffs in this Court, however, have apparently abandoned the contention that in the absence of a collectively bargained agreement the defendant could not put the Accounting and Guarantee Plan into effect without complying with the provisions of Section 6 of the Railway Labor Act and securing the express consent of the red caps to the plan, apart from and in addition to such consent as was implied in their continuing to work under the plan after having received due notice thereof.

The plaintiffs, undoubtedly realizing that the pro-

visions of Section 6 of the Railway Labor Act do not apply to individual contracts of employment, have now attempted in their brief in this Court to give substance to their argument with respect to the Railway Labor Act by contending that there was actually a collectively bargained agreement in effect between the defendant and the plaintiffs on October 24, 1938, when they received notice of the Accounting and Guarantee Plan; that the notice of that date was a unilateral attempt by the defendant to change this alleged collectively bargained agreement; that the notice was therefore of no legal effect; and that, because of the nullity of the notice, the money collected by the red caps from defendant's patrons continued to be the absolute personal property of the red caps and consequently could not be applied by the defendant on their wages. (Petitioner's Brief, pp. 21-25).

This contention of the plaintiffs is legally unsound and is not supported by the record, because Section 2, seventh, and Section 6 of the Railway Labor Act have reference only to collectively bargained agreements and not to individual contracts of employment, and the record shows that there was no collectively bargained agreement in existence between the plaintiffs and the defendant on October 24, 1938, when notice of the Accounting and Guarantee Plan was received by the plaintiffs. Furthermore, even assuming that there was a collectively bargained agreement between the plaintiffs and defendant on October 24, 1938, the notice of that date did not effect any change in such agreement so as to constitute a viola-

tion of Section 2, seventh, or Section 6 of the Railway Labor Act.

These points are considered in turn below.

A. Section 2, Seventh, and Section 6 of the Railway Labor Act have Application only to Changes in an Existing Collectively Bargained Agreement.

Section 2, seventh, and Section 6 of the Railway Labor Act have no application to individual contracts of employment between a carrier and its individual employes. Section 2, seventh, of the Act reads as follows:

> "Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

Section 6 of the Act provides:

> "Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be

> altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

It is clear from the terms employed in these two sections of the Act that the "agreements" referred to can only be collectively bargained agreements made by a carrier with a "class or craft" of employes through a duly recognized or accredited bargaining "representative" who, under the provisions of the Act, is authorized to deal for the entire class or craft. Thus, Section 2, seventh, provides that rates of pay, rules or working conditions of the employes "as a class as embodied in agreements" may not be changed except as provided therein. The only manner in which the Railway Labor Act contemplates that a carrier shall negotiate or agree with its employes "as a class" is through a collective bargaining representative, selected in accordance with the provisions of the Act (*i. e.*, selected by a majority of any particular class or craft of employes—Section 2, fourth, of the Act). The language of Section 6 also indicates conclusively that it is intended to apply only to collectively bargained agreements, and not to individual contracts of employment. It provides that the carriers and "representatives of the employes" shall give notice of an intended change in agreements, and it provides that the time and place for the beginning of conferences with respect to the proposed changes be-

tween "representatives of the parties interested in such intended changes shall be agreed upon" within a specified period. Obviously, such provisions have no pertinence with reference to the "working agreement" between an employer and an individual employe. Here again, therefore, the Act is clearly concerned only with changes in such agreements as have been made between the carrier and "representatives of the employes"—*i. e.*, collectively bargained agreements—such representatives being those selected by the majority of a class or craft of employes in accordance with the provisions of the Act.

That the agreements with which the Act is concerned are those resulting from collective bargaining, rather than individual contracts of employment, is made clear by the discussion of the policy and purposes of the Act contained in the opinion of this Court in *Virginian Railway Co.* v. *System Federation No. 40, et al.*, 300 U. S. 515, 57 S. Ct. 592 (1937), quoted above (p. 94), to the effect that the Act does not preclude individual contracts of employment.

Thus it cannot be denied that Section 2, seventh, and Section 6 of the Act are purely procedural requirements, applicable by their terms when, and only when, either of the parties to an existing collectively bargained agreement desires to make changes in that agreement affecting rates of pay, rules or working conditions. It has no application unless such a collectively bargained agreement exists. This is, in fact, now conceded by the plaintiffs (Petitioner's Brief, p. 24):

> "The collective bargaining agreement of February 1, 1937, and the subsequent amendments thereto, is the *collective bargaining agreement which Section 156* [i. e. Section 6] *of the Railway Labor Act prevented the Terminal Company from altering* and held status quo the right of the Red Caps to the tips and gratuities received from the passenger." (Emphasis supplied)

Having abandoned the argument which they previously made to the effect that the Railway Labor Act prohibited the carrier from making any change in rates of pay or working conditions of the red caps because of the existence of individual contracts of employment, and apparently conceding that the provisions of Section 2, seventh, and Section 6 of the Act apply only to collectively bargained agreements, the plaintiffs now argue that such an agreement was in fact in existence at the time when the defendant instituted the Accounting and Guarantee Plan on October 24, 1938. It therefore becomes necessary to determine from the record whether there was in existence at that time any collectively bargained agreement between the defendant and a collective bargaining agent or representative of the red caps selected in accordance with the provisions of the Railway Labor Act.

B. There Was no Collectively Bargained Agreement in Existence Between the Plaintiffs and the Defendant When the Plaintiffs Were Given Notice of the Accounting and Guarantee Plan on October 24, 1938.

The plaintiffs contend in their brief in this Court (Petitioner's Brief, pp. 14, 21-25) that there was in

existence on October 24, 1938, when they received notice of the Accounting and Guarantee Plan, a collectively bargained agreement between the defendant and the red caps. The plaintiffs attempt to support this conclusion by reference to the exchange of correspondence between the General Chairman of the Brotherhood of Railway Clerks and the General Manager of the defendant, which is included in the record. This correspondence, together with the statements of the General Chairman of the Brotherhood of Railway Clerks and the defendant's General Manager contained in depositions set forth in the record, has been analyzed and considered in detail in the Statement above (pp. 22-45).

The analysis of the record contained in that part of the Statement shows that the Accounting and Guarantee Plan was placed in effect by a notice delivered to the red caps on or before October 24, 1938. The agreement which the plaintiffs now contend covered red caps on that date was the agreement made in February, 1937, between the defendant and the Brotherhood of Railway Clerks, covering by its terms clerical, station and storehouse employes, and expressly excepting "individuals performing personal services not a part of the duties of the Company" (Def. Ex. A, R. 81, 166-189). At the time this agreement was made between the defendant and the Brotherhood of Railway Clerks, that organization did not represent and did not claim to represent red caps. It was not until November 3, 1938 (almost two years after the making of the agreement upon which the

plaintiffs rely), that the Brotherhood of Railway Clerks secured the right to represent red caps, including plaintiffs. This was admitted by Wooten, the General Chairman of the Clerks' organization, in his deposition (see Statement above, p. 27, and R. 71, 72 and 83).

On the basis of the authority of the Brotherhood of Railway Clerks to represent red caps, obtained on or about November 3, 1938, the defendant subsequently to that date entered into negotiations for the first time with the Brotherhood as the duly authorized collective bargaining agent of the red caps. These negotiations ultimately culminated in an agreement covering the working conditions of red caps. This agreement was not effective until June 16, 1939. It contained no provisions with respect to wages.

That there was no collectively bargained agreement in existence on October 24, 1938, between the red caps or any representative thereof and the defendant is clear from:

(1) the terms of the Clerks' agreement of 1937;

(2) the circumstances surrounding the negotiation and execution of that agreement;

(3) the conduct of the defendant and the plaintiffs subsequent to the execution of that agreement;

(4) admissions of the plaintiffs and their representatives that that agreement had no application to red caps; and

(5) the terms of the agreement executed on June 16, 1939, which admittedly covered red caps.

As set forth above (pp. 24-35), the agreement of 1937 (Def. Ex. A, R. 81; 166-189) which became effective on February 1, 1937, expressly excepted from its application "individuals performing personal service not a part of the duties of the Company" (R. 167). It should be remembered that at that time (*i. e.*, 1937) the red caps were not regarded by the carriers as employes, and the services they performed were not considered as coming within the duties of the railroads as common carriers. Thus, at the time that agreement was made, red cap service was considered by the carriers as "personal service not a part of the duties of the Company."

The fact that this exception in the agreement of 1937 was intended to apply to red caps is further demonstrated by the statement of the Director General of Railroads, reported in the decision of the Interstate Commerce Commission in *Ex Parte 72*, concerning the status of red caps, that "the service performed by 'Red Caps' is personal service not a part of the duties of the carrier" (p. 29 above).

Not only does the language of the agreement itself indicate that it did not apply to red caps, but also the circumstances surrounding the negotiation and execution of this agreement lead to the same conclusion. The Brotherhood of Railway Clerks, with which the agreement of 1937 was made, did not represent the red caps at that time, and in fact did not secure authority to represent them until almost two years later. When the significance of this fact is considered,

the conclusion becomes inescapable that that agreement did not apply to red caps. The Brotherhood of Railway Clerks had no more reason for attempting to include red caps in this agreement—a class or craft which they did not represent—than they had for attempting to include engineers or shop craft employes, or any of the other classes of employes employed by the defendant. This organization had no authority to speak for red caps; no red caps were members of the organization; and, as Wooten said in his deposition (above, p. 34; R. 80), his organization had no interest in acting for the red caps until such time as they could establish their status as employes of the Terminal Company. He deposed that he had been approached over a period of two years by the red caps, and had always told them that they would have to have their status as employes established before his organization would consider representing them for collective bargaining purposes. His exact language (which is set forth in full at page 34 above) is:

> "The Red Caps employed by the Jacksonville Terminal Company had been negotiating with me for approximately two years to become organized and get an agreement or come within the scope of our agreement [viz., the Clerks' agreement of 1937] * * * I notified these employees that it would be useless to become organized until the Commission had rendered their decision, but that as soon as that decision was rendered, if it was favorable, we would accept the employees into

the organization and make contracts and handle their wages and working conditions as provided by the amended Railway Labor Act."

In the same statement Wooten says that he did not learn of the Interstate Commerce Commission's holding that red caps were employes until October 24, 1938. By his own statement, his interest in the plaintiffs dated from October 24, 1938, and his right to represent them dated from November 3, 1938. Prior to that time, by his own statement, "* * * it would be useless * * *" for them to become organized for the purpose of collective bargaining. Thus Wooten, who negotiated the agreement of 1937 as the representative of the Brotherhood of Railway Clerks, admits that, at the time that agreement was entered into, the red caps were not organized for the purposes of collective bargaining, and that his organization did not represent them. The clear inference, therefore, must be that they were not intended to be covered by that agreement.

The conduct of the Terminal Company and the Brotherhood of Railway Clerks, as well as the conduct of the red caps from February 1, 1937, when the Clerks' agreement was executed, until the institution of the Accounting and Guarantee Plan on October 24, 1938, is enlightening. No claim was made by the Brotherhood that red caps were covered by the 1937 agreement until after the institution of the Accounting and Guarantee Plan. The record does not indicate that, prior to that time, any claims had

ever been made that red caps were covered by the agreement of 1937. Although that agreement contained provisions with respect to seniority rights, the record indicates that as late as December 7, 1938, the defendant did not accord any seniority rights to red caps, and in fact was "laying off" red caps having greater seniority in favor of younger men with less seniority. This is revealed by a letter from Wooten to Wilkes, the General Manager of the defendant (Pl. Ex. 5, R. 52, 100-101; see p. 32 above). It is also significant that after February 1, 1937, the red caps (including plaintiffs) continued to receive their compensation in the same manner in which they had received it prior to the execution of the agreement of 1937, and in fact no changes whatever occurred in their relations with the defendant at that time.

The record contains numerous admissions by the plaintiffs' witnesses that the agreement of 1937 had no application to red caps. As set forth above, Wooten admitted that his organization did not represent red caps when the agreement of 1937 was made; that his organization had no interest in the red caps, had repeatedly refused to represent them for collective bargaining purposes, and did not in fact represent them for such purposes until almost two years after the agreement of 1937 became effective. On November 14, 1938, after Wooten had secured authority to represent the red caps, he asked in a letter to Wilkes (R. 51, 95; see above, p. 31) that Wilkes meet him "* * *. and draw and sign a contract

covering them as you did not seem to be willing to agree that our present contract should cover them."

Further admissions with respect to the non-application to red caps of the agreement of 1937 are found in the testimony of the plaintiffs' witnesses in the depositions contained in the record. Plaintiffs' witness Wilkes, on direct examination by plaintiffs' counsel, said (R. 61):

> "Q. Then the agreement of June 16, 1939, and the agreement of August 9, 1940, are the only two agreements your company has had with these men since the effective date of the Wage and Hour Law?
>
> "A. That is correct. Both are in effect at the present time."

Plaintiffs' witness Wooten, upon being examined by plaintiffs' counsel (R. 83, 84), said:

> "A. * * * At no time during the entire negotiation, starting at the conference of November 4, 1938, and up until the signing of the agreement of August 7, 1940, to be effective August 1, 1940, was there any agreement between Mr. Wilkes and myself as to the correct pay for the Red Caps from October 24, 1938, until August, 1940. * * *"

After the Brotherhood of Railway Clerks secured authority to represent the red caps for the first time on November 3, 1938, Wooten entered into negotia-

tions with Wilkes, for the purpose of making an agreement to cover the working conditions and rates of pay of the red caps. These negotiations continued until June 16, 1939, almost eight months after the institution of the Accounting and Guarantee Plan. Wilkes refused to enter into any collective agreement with respect to rates of pay for the red caps, and insisted that the red caps should continue to receive their compensation under the Accounting and Guarantee Plan. However, an agreement covering the working conditions of the red caps was concluded on June 16, 1939.

In addition to all the factors set forth above, which indicate conclusively that the agreement of 1937 had no application to red caps, this first agreement covering red caps, effective June 16, 1939, itself lends support to the same conclusion. Many of the provisions of this agreement applying to red caps are almost identical with similar provisions in the agreement of 1937 (pp. 35-36, above). If the agreement of 1937 applied to red caps, there would have been no need to consume almost eight months in negotiations to arrive at an agreement which would cover them, and the provisions of which were almost identical with certain of those of the agreement of 1937. That this new agreement, concluded in 1939, was the first collectively bargained agreement covering red caps is further evidenced by the provisions of the agreement itself. Rule 1 of this agreement expressly negatives the claim that red caps were subject to the

prior Clerks' agreement of 1937. This rule states that:

> "These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains, and all other employes handling hand baggage *not already covered by agreement.*" (Above, p. 36) (Emphasis supplied)

Therefore, when the record in this case is analyzed, it is found that the claim of the plaintiffs, asserted here for the first time, that an agreement entered into in 1937 with the Brotherhood of Railway Clerks covered red caps, is completely unfounded. This conclusion is made inevitable by the terms of the agreement of 1937, which exclude persons such as red caps; by the circumstances surrounding the negotiation and execution of the agreement of 1937, which show that the Brotherhood had no interest in red caps and was not representing them; by the conduct of the Terminal Company and the plaintiffs subsequent to the agreement of 1937, which shows that the provisions of the agreement of 1937 were never applied to red caps and that no claim was ever made that the agreement should be so applied; by admissions of the plaintiffs' witnesses that the agreement of 1937 had no application to red caps; and finally by the terms of the agreement which was ultimately entered into between the Terminal Company and the Brotherhood, as the representative of the red caps, on June 16, 1939.

C. Even Assuming a Collectively Bargained Agreement Between the Plaintiffs and the Defendant to have been in Existence on October 24, 1938, the Notice of that Date, Instituting the Accounting and Guarantee Plan, Effected no Change which would Constitute a Violation of the Railway Labor Act.

The plaintiffs argue that the notice of October 24, 1938, which put the Accounting and Guarantee Plan into effect, violated Section 2, seventh, and Section 6 of the Railway Labor Act in that it was an attempt by the defendant to effect a unilateral change in an existing collectively bargained agreement covering the red caps. As the defendant has shown above, there was no such collective agreement in existence on October 24, 1938; but if, for the sake of argument, it is assumed, contrary to the facts, that the Clerks' agreement of 1937 did, by its terms and in accordance with the intention of the parties, cover red caps, nevertheless the notice of October 24, 1938, effected no change whatever in any of the provisions of that agreement. The two sections of the Railway Labor Act relied on by the plaintiffs apply only to changes in agreements and, therefore, have no application if there was in fact no change. There was in fact no change made, or attempted to be made, by the notice of October 24th, for two reasons; in the first place, because the notice related to a subject not covered by or included in the agreement of 1937 or any other collectively bargained agreement respecting red caps, and, in the second place, because the

notice did not effectuate or purport to effectuate any change whatever in the method by which the red caps had received their wages up to that time, but only provided for the payment to them of such additional sums as might be necessary to bring their wages in all instances up to the statutory wage prescribed by the Fair Labor Standards Act.

1: The Notice of October 24, 1938, Related to a Subject not Covered by the Agreement of 1937 or by any other Collectively Bargained Agreement Respecting Red Caps.

The notice of October 24, 1938, covered no subject and contained no provisions except with respect to the manner in which the red caps, including the plaintiffs, were to receive their compensation for the work they performed for the defendant.

The record shows that the agreement of 1937 (R. 166-189), negotiated as it was with respect to other classes of employes, not only contained no provision concerning rates of pay or method of payment for red caps, but contained no rates of pay for any class of employes, and was entirely barren of any provision setting forth what any employe should be paid or should receive as wages. In other words, even assuming that the agreement applied to red caps, there was nothing whatever in it that would be altered by a change in the red caps' wages or in the method of paying them. Consequently, no matter what provision the notice of October 24, 1938, might have

contained with respect to payment of wages to the red caps, that notice could not be held to have changed, or to have been an attempt to change, any provision in the agreement of 1937. This being so, the notice cannot be held to constitute a violation of those provisions of the Railway Labor Act which prohibit such changes without negotiation.

The record is full of statements showing that there never was any collectively bargained agreement of any kind between the defendant and the red caps, including plaintiffs, concerning wages or rates of pay during the whole of the period covered by this action. The plaintiffs' witness Wooten testified that the agreement of 1937 did not contain any provision with respect to wages. He said that provisions respecting wages of employes covered by that agreement were contained in two separate agreements, and he admitted that these separate agreements did not apply to red caps. In referring to the agreement of 1937, he said (R. 80):

> "A. * * * That agreement does not carry any wage sale [scale] in it at all; that is a working agreement that you have just submitted; and between the date of that agreement and the date you have mentioned, July 1, 1940, there were two agreements between our organization and the Jacksonville Terminal Company pertaining to wages of employees covered by that agreement.
>
> "Q. Are those agreements among the agreements which have been identified and introduced here?
>
> "A. They are not.

"Q. Did those agreements relate to red caps?

"A. They did not.

"Q. In any way?

"A. They did not; but they did relate to the employees covered by that agreement at the time it was made."

Incidentally, this last statement of Wooten's is a further admission that the Clerks' agreement of 1937 did not cover red caps; for if it did not cover them at the time when it was made, it clearly could not have been extended to cover them save by subsequent agreement between the parties; and of course the defendant never made or assented to any such subsequent agreement.

It is clear from the record that there was never any collectively bargained agreement between the red caps and the defendant covering wages until August 7, 1940, which is over a month after the end of the period covered by this action. This is shown by Wooten's testimony (above, pp. 39-40; R. 4, 72-74). Therefore, even if it is assumed that the agreement of 1937 specifically covered red caps, there was no provision in this agreement which was changed, or attempted to be changed, or which could have been changed, by the notice of October 24, 1938.

2. THE NOTICE OF OCTOBER 24, 1938, DID NOT EFFECTUATE OR PURPORT TO EFFECTUATE ANY CHANGE IN THE MANNER IN WHICH THE RED CAPS HAD RECEIVED THEIR WAGES UP TO THAT TIME, BUT ONLY PROVIDED FOR THE PAYMENT TO THEM OF SUCH ADDITIONAL SUMS AS MIGHT BE NECESSARY TO BRING THEIR WAGES

IN ALL INSTANCES UP TO THE STATUTORY WAGE PRESCRIBED BY THE FAIR LABOR STANDARDS ACT.

Prior to the notice of October 24th the red caps received their compensation through being permitted by the defendant to keep the sums collected by them from the public for the service which they performed. As set forth above in detail (pp. 11-13), if the plaintiffs were in fact employes of the defendant prior to October 24, 1938, as they contend, and as the Interstate Commerce Commission found, then the services which they were performing for the public were being performed by the defendant, through the red caps as the defendant's employes. It follows that the sums which the Terminal Company permitted them to collect and keep constituted their remuneration or wages as such employes. The notice of October 24, 1938, made no change whatever in this situation. It merely notified the red caps that they would thereafter, in the future as in the past, be permitted to keep as their own the sums which they collected from the defendant's patrons. In the future, as in the past, these sums were to be their wages. However, the notice assured them, in addition, that in order to comply with the Fair Labor Standards Act the defendant would directly pay to them such further sums as should be needed to bring those wages in all instances up to the amount prescribed by Section 6 (a) of that Act. For this purpose it notified them that, in order that the defendant might obtain the information necessary to pay them these additional amounts if due, they would thenceforward be required to report to the defendant the

amount of money collected from its passengers, and that if said amount was less than the minimum prescribed by statute the Terminal Company would make up the difference. Under the terms of the notice, if the plaintiffs collected from passengers more than the statutory minimum, they were permitted to keep the entire amount, including the excess, as they had always done in the past.

In short, the method of wage payment announced by the notice of October 24, 1938, made no change in the method by which the red caps were being paid at the time when that notice was issued to them. All that it did was to inform them that thereafter in certain cases they would receive more, viz., whatever sums were needed to make up the full statutory minimum wage. Aside from this, they would continue to receive in the future exactly what they had always received in the past, viz., the amounts collected by them from the defendant's patrons. Certainly the only change which was thus effected was the change involved in promising to pay them the additional amounts needed to make up the guarantee. The tips, through which the balance of their wages was paid, were the same tips through which their wages had always been paid previously.

The plaintiffs themselves admit that there was no change in the method by which the red caps were paid after October 24, 1938, as compared with the method by which they had been paid their wages prior to that time. Thus at page 22 of the Petitioner's Brief appears the following statement:

> "By continuing to allow the Red Caps to receive tips and gratuities from the passengers *as their compensation,* the Terminal Company ratified or confirmed the contractual relations regarding the right to and ownership of tips as being the property of the Red Caps, or in other words, *their wages for the work performed for the Company.*" (Emphasis supplied)

In the sentence just quoted the plaintiffs clearly admit that, prior to as well as after the notice of October 24, 1938, the tips became the property of the red caps only because the defendant gave its consent, and that the defendant did thus give its consent by permitting the tips, in becoming the property of the red caps, to be received by them as their "compensation" or "wages for the work performed for the Company." This was as true before the notice of October 24th as thereafter. The notice worked no change in the status of the red caps' compensation. It merely made that status clear and added the promise of the further and additional payments needed to make up the guarantee of the full minimum wage. The requirement of reporting the tips was simply to make it possible for the defendant to keep this additional promise.

There is, therefore, no ground whatever for contending that the notice attempted to effectuate a unilateral change in the method of paying the red caps their wages, even assuming that the existing method was embodied in a collective agreement, which of course it was not.

CONCLUSION.

If this case is viewed as a whole, in the light of all the considerations set forth above and the supporting facts and authorities, it becomes difficult to understand what wrong or injury the plaintiffs are complaining of herein. No money has been taken away from them; no change has been made or attempted to be made in any collective agreement respecting wages or rates of pay, or in any collective agreement of any sort; and indeed no change has been made in the plaintiffs' wages or rates of pay which results in their being in any worse position than before. The fact is that the Accounting and Guarantee Plan was instituted as part of an arrangement to enable each of the plaintiffs to receive as much or more money, and the plaintiffs as a group to receive more, than they would have without such an arrangement. In the words of Judge Waller in the District Court below (35 F. Supp. at p. 271): *"The red cap stood to win. He could not lose. The company stood only to lose. It could never win.* The red cap could often receive for his services more than the minimum wage but never less." (R. 202). (Emphasis supplied)

Of course the plaintiffs' rights were in certain respects affected by the enactment of the Fair Labor Standards Act. That enactment, coupled with the finding of the Interstate Commerce Commission to the effect that they were employes of the defendant, entitled them to be thereafter paid by their employer not less than certain amounts. It did not, however,

require that those amounts should be paid in any particular manner or by any specific method. Nothing in the letter or purpose of the Act prohibited the defendant from paying the plaintiffs by continuing to provide them with the means of obtaining the necessary amounts of money from the defendant's patrons, and this is all that the Accounting and Guarantee Plan did. The defendant, as employer of the plaintiffs, was entitled, as a matter of common-law right and in the absence of a collective agreement to the contrary, to control the disposition of whatever sums the plaintiffs collected from defendant's patrons in the course of the employment, whether such sums are regarded as compensation for services or as tips or gratuities. The defendant therefore could lawfully have required the plaintiffs to pay over to it all sums so collected by them. But the defendant did not go so far as that. It merely notified the plaintiffs that the defendant would pay them not less than the full amount of money to which as employes they were entitled under the Fair Labor Standards Act, and that, in order to enable the defendant to do so, the plaintiffs should inform the defendant of the sums which they collected in the course of their duties in serving defendant's patrons, so that defendant would know what additional amounts, if any, it would have to pay them in order to make up the required total.

That was the sole significance of the notice of October 24, 1938. The notice did not constitute or purport to constitute a change in any agreement pro-

fected by statute, because (1) the only agreements protected by the statute in question (the Railway Labor Act) are those which are arrived at by collective bargaining, (2) no such collectively bargained agreement between the plaintiffs and the defendant was in existence on or prior to the date of the notice, and (3) in any event, even if there had been in existence at that time a collective agreement such as the plaintiffs claim, the notice neither effected nor purported to effect any change in any matter covered by the agreement. The only agreements between the plaintiffs and the defendant which were in fact in existence at the time of the notice were the understandings implicit in the conditions under which the plaintiffs worked individually from pay-day to pay-day. These understandings were subject to change by either party, upon proper notice thereof to the other party. If the notice of October 24, 1938, should be construed to effect any change in these understandings between the defendant and the plaintiffs individually; then such change was accepted by each plaintiff and became part of his understanding with the defendant when he continued to work and to accept the benefits conferred by the notice. In no other respect was any contract right of the plaintiffs, either individually or collectively, affected by the notice or by the Accounting and Guarantee Plan.

Thus, by permitting the plaintiffs to retain as their own the sums which they collected from defendant's patrons in the course of their employment, and which

defendant could lawfully have compelled them to pay over to it, the defendant provided the plaintiffs with the means of obtaining from its patrons, in the form of sums which it could have claimed for itself, the money, or at least a portion of the money, to which they were entitled under the Fair Labor Standards Act; and, by paying directly to the plaintiffs the difference between the amounts thus collected and the statutory wage, the defendant insured to the plaintiffs payment of the full amount specified in the Act. This constituted a payment by the employer to the employe of the full statutory wage, just as much as if the defendant had paid the plaintiffs the whole amount directly in cash, or had paid them by transferring a claim against a bank for the full amount, in the form of a check. But even if this method of payment should not appear on its face to fall within the letter of the Fair Labor Standards Act, it certainly resulted in the payment to the plaintiffs by the act of the defendant, from sums which the defendant could have reclaimed, of the full amount of money which the Congress has specified as the amount necessary in its opinion to defray the cost of a minimum standard of decent living, and therefore it completely fulfilled the undisputed purpose of the Act and the manifest intent of the Congress in enacting it. Any other conclusion would amount to an interpretation of the Act in disregard of its purpose as well as of the proper sense of its language, and would, in the words of Judge Waller, "produce legislative or judicial brigandage," by sanctioning the employment of the Act

as an instrument to impose unwarranted burdens on the defendant and secure to the plaintiffs "the minimum wage thrice multiplied," contrary to the policy of the Congress and to manifest principles of equity and justice.

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